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G A R V E Y S C H U B E R T B A R E R

December 8, 2008

Please reply to JAMES E. DUNSTAN  
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File No. 22385-00100-60

Mr. Mel Blackwell  
Vice President  
Schools and Libraries Division  
Universal Service Administrative Company  
2000 L Street, N.W.  
Suite 200  
Washington, DC 20036

Re: Participation of Navajo Nation DINE (BEN 233673) and Navajo  
Nation Head Start Consortium (BEN 16028599) in the School and  
Libraries Program

Dear Mr. Blackwell:

This letter is made in response to the October 22, 2008, letter of the Universal Service Administrative Company ("USAC"), and in response to issues raised in our meeting of September 12, 2008 ("Meeting").

#### **Background and Scope of Investigation**

Garvey Schubert Barer ("GSB") was retained on or about March 14, 2008, by the Navajo Nation ("the Nation") through the Nation's Attorney General's office, to assist it in responding to a USAC inquiry concerning 2007-2008 E-rate filings by the Nation. GSB's role was expanded on or about July 23, 2008 to include a broader review of the Nation's participation in the E-rate program, and to respond to various USAC inquiries concerning such participation. As part of our investigation, we reviewed the document entitled "A Special Review of the Navajo Nation Payments to OnSat," Audit Report No. 07-04, prepared by Elizabeth Begay of the Nation's Auditor General's Office (the "Special Review"), along with certain responses and documents that went into the preparation of the Special Review. We also conducted on-site interviews 2008 in Window Rock, Arizona, July 24-25, with certain members of the Nation involved with the E-rate program.

It is important to understand that while the Special Review covers a number of issues related to the Nation's relationship with OnSat Network Communications, Inc. ("OnSat"), GSB has been retained to review only that portion of the relationship that impacts the

Nation's participation in the E-rate program.<sup>1</sup> We have not investigated, for example, allegations in the Special Review concerning OnSat's overbilling of the Nation for computers and software purchased through a grant from the Bill and Melinda Gates Foundation, as being beyond the scope of our task. We did, however investigate allegations as to whether OnSat services were delivered to Nation sites that may or may not have been built using E-rate money.

Part I summarizes relevant investigatory findings we made. Part II addresses the ten (10) issues raised by your October 22, 2008 letter. Part III outlines the E-rate compliance plan we have proposed to the Nation for adoption.

## **Part I: GSB Findings**

### **A: The Structure of the Contracts Between OnSat and the Navajo Nation led to Significant Problems**

A key finding of GSB's investigation is that the use of OnSat's standard Master Agreement with multiple addenda, modifications and Statements of Work (SOWs) to deliver both E-rate and non-E-rate eligible services, coupled with OnSat's invoicing policies, makes it nearly impossible for the Nation to track payments, services, and eligible services.<sup>2</sup>

Some historical background is needed to understand how the contractual relationship between the Nation and OnSat evolved. Beginning in 2000, the Bill and Melinda Gates Foundation granted the Nation a total of \$6,135,285 to install computers in each of the then 108<sup>3</sup> Chapter Houses on the Nation (the "Gates Grants").<sup>4</sup> The Gates Foundation introduced

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<sup>1</sup> See *infra*, Part II, response to Question 1.2.

<sup>2</sup> See *infra*, Part III for a discussion of how the Nation plans on addressing this problem on a going-forward basis.

<sup>3</sup> A total of 111 Chapter Houses now exist. Mod 3/ SOW 13 to the Master Agreement, increased connectivity services to 111 Chapter Houses in May, 2004.

<sup>4</sup> See Exhibit 1, "Native American Access to Technology Program: Progress Report, A Report to the Bill & Melinda Gates Foundation" ("Gates Report"). Note that many of these exhibit documents came from the files of Elizabeth Begay, Navajo Nation Auditor, who authored the Special Review. Some of the exhibits contain her handwritten notes, as well as others, depending on the original source of the document. Undersigned counsel did not create any of the handwritten notes on the exhibits. See also <http://www.nnheadstart.org/content.asp?CustComKey=52853&CategoryKey=53714&pn=Page&DomName=nnheadstart.org> ("It was OnSat, who was commissioned through a Grant from the Bill and Melinda Gates Foundation to initially install satellites for 108 Chapter Houses across the Navajo Nation. This is what got the ball rolling."); <http://209.85.173.104/search?q=cache:nkrY-bjMVUcJ:www.gpgi.org/cms/kunde/rtsgpgiorg/docs/800365454-09-20-2004-00-47-07.pdf+navajo+head+start+onsat&hl=en&ct=clnk&cd=7&gl=us&client=firefox-a> ("The Gates Foundation in partnership with OnSat provided satellite based connectivity and computers to 108 Chapter Houses for Free Public Access Computing"); See also Special Review, p. 2.

the Nation to OnSat<sup>5</sup> and “partnered” with OnSat to provide satellite hardware and connectivity under this grant.<sup>6</sup>

### **1. The Master Agreement Limits the Nation’s Ability to Contest OnSat Services or Seek Refunds**

In November, 2001, the Nation was presented with OnSat’s standard form contract (the “Master Agreement”), attached hereto as part of Exhibit 4.<sup>7</sup> The form contract contained a number of provisions that limited the Nation’s ability to question the services provided or the amounts charged for services. OnSat’s responses to the Special Review rely extensively on these provisions to deny culpability.<sup>8</sup> For example:

- 1) OnSat contends that it is not responsible for defective services to which the Nation does not promptly object.

“Under the terms of the Master Agreement (OnSat Exhibit ‘A’), Section 2.d, which remained unchanged by the negotiated Addendum to the Master Contract (OnSat Exhibit ‘B’), the Navajo Nation has **ten (10) days** after the delivery of service in which to notify OnSat whether the services fail to comply with the relevant SOW. It further states that if OnSat is not notified of any problems within this time period, the service shall be deemed accepted by the Customer. In all fairness, with billing in arrears this clause should be deemed tolled until the invoice is actually submitted. However this time period is computed, the time during which the Navajo Nation can dispute an invoice (particularly one that has been paid!) has long passed under the terms of the Master Agreement.”<sup>9</sup>

- 2) OnSat contends that it is under no obligation to the Nation to refund any amounts that were overbilled for installation of equipment because the Nation did not comply with Section 2.d of the Master Agreement.

“Although it is not required to do so under the OnSat Master Agreement or Addendum thereto, OnSat will concede that it cannot document the installation of equipment for 29 of the 233 installation services for which it billed Head Start, and will give the Head Start program a credit of \$43,500 for

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<sup>5</sup> Exhibit 2, excerpts of 2001 presentation of Gates Foundation and OnSat representatives to the Coalition for Networked Information.

<sup>6</sup> Exhibit 3, Gates Grants documents.

<sup>7</sup> Exhibit 4 contains copies of all relevant contracts, modifications, addenda and statements of work (SOWs) between the Nation and OnSat. The Nation refers to the Master Agreement as C22052, while OnSat refers to it as “No. 30019.”

<sup>8</sup> See Exhibit 5, “OnSat Response of June 8, 2007, to The Special Review of Payments Made to OnSat.”

<sup>9</sup> *Id.*, p. 3.

29 units (at \$1,500 per installation) since it can only document that 204 classrooms were actually scheduled for such installation.”<sup>10</sup>

- 3) OnSat claims that the Master Agreement limits the out-of-service credit, because the Nation was required to determine whether the OnSat system was actually working.

“An out-of-service credit, with certain dollar limitations, will be provided at the daily service rate where the satellite system internet connectivity is the cause of the failure ‘. . . provided that Transmission Interruption lasts for more than six (6) consecutive hours after OnSat receives notice of the interruption from the Customer.’ While OnSat can remotely monitor system usage, it has no idea of whether the system is out-of-service, or just not being used, without notification from the chapter.”<sup>11</sup>

- 4) OnSat claims that unless the Nation promptly objects to an invoice the underlying services are “accepted.”

“Under Section 2.d of the Master Agreement, the Division of Community Development had a limited period in which to object to an invoice for services, after which the services would be deemed accepted.”<sup>12</sup>

- 5) Despite OnSat’s reliance on contractual feedback mechanisms as a defense, the first Addendum to the Master Agreement, executed concurrently with the Master Agreement, was designed to allow OnSat to bill the Nation for an entire year’s service *in advance*.

“It should be mentioned that Addendum to the Master Agreement (OnSat Exhibit ‘B’) specified in Section 4.d, added through negotiations by the Navajo Nation, states that ‘OnSat shall invoice the customer for each year of service, in advance, in the amount specified in the applicable SOW.’ While OnSat routinely computed its invoices on a quarterly basis, per the terms of the Addendums to the contract, the invoices were, in most instances, based on the total specified in the applicable Scope of Work (‘SOW’).”<sup>13</sup>

“Not only has the [Department of Community Development] DCD never objected to items on an invoice for chapter services, it has never at any time

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<sup>10</sup> *Id.*, p. 4. The reference here to 204 installations rather than 233 does *not* impact any E-rate issues because the installation was done with Gates Foundation money, and when it came to connectivity using E-rate funding, the Head Start SOW 3 used as the basis for FRN submissions 1347323 and 1347449 specified connectivity only for the 204 Head Starts classrooms that were built out, not the 233 originally contracted for. *See infra*, Part II, response to question 1.2. OnSat’s response is quoted above merely to show OnSat’s position that it is under no legal responsibility to refund any amounts unless disputed within 10 days of delivery of the service.

<sup>11</sup> *Id.*, p. 7.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, p. 3.

asked for, or claimed, an out-of-service credit during the seven years which On Sat has been providing services to the chapters.”<sup>14</sup>

If OnSat’s argument were credited, the Nation would have been required to object to an invoice to receive out-of-service credit for outages that had not yet occurred!

- 6) OnSat’s proposed compromise on out-of-service credits underscores the impossibility of determining what services the Nation received.

“However, acting in good faith and with the recognition that it is under no obligation to do so, OnSat will retroactively grant out-of-service credit in every instance where the DCD can document, in writing, that OnSat was notified of a failure of Transmission services, but not internal system failures within the chapter, and that OnSat did not correct the Transmission Interruption within six hours of being so notified by the DCD.”<sup>15</sup>

The problem is that the Navajo Nation had no ability either under the contract, or technically, to determine whether the OnSat system was, in fact, operating. After numerous requests for OnSat to provide documentation as to whether the OnSat system was operating at all times, OnSat responded:

“OnSat monitors the beginning and end of a transmission on both the ground site and the satellite. OnSat maintains these records for each chapter. . . The yearly records for a chapter are between one and two thousand pages in length and the cumulative records for a single chapter are in excess of 10,000 pages, with the cumulative chapter records, if they were all printed out, running in excess of one million pages.”<sup>16</sup>

OnSat provided a sample of the raw data dump to the Nation in its Response, Exhibit I thereto, but never supplied a full report.

- 7) Finally, but of particular importance, in a June 27, 2006 memo, OnSat took the position that the Master Agreement and Modifications call for a fixed price to be paid no matter how many Chapter Houses actually made use of the bandwidth.

“The total cost of the bandwidth is divided by the number of Chapters whether 70 Chapters or 110 Chapters.”<sup>17</sup>

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<sup>14</sup> *Id.*, p. 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, p. 6.

<sup>17</sup> See Exhibit 6, June 27, 2006 memo from David Stephens, President of OnSat to Arbin Mitchell, Acting Director, DCD.

According to OnSat, it did not matter how many Chapter House libraries were receiving service, or how much bandwidth they were using. The Nation was obligated to pay the full amount in any circumstance.

## **2. The Use of a Master Agreement with Multiple Modifications Made Contract Oversight a Nightmare**

The large number of “Modifications,” “Addendum,” and “Statements of Work” that modify both the Master Agreement and the Head Start Agreement make tracking the services provided, and payments for such service, almost impossible. In its review, GSB identified the following contractual documents:<sup>18</sup>

**Table 1: List of OnSat Agreements**

Contract	Date	Brief Description
Master Agreement (C22052)	11/30/01	Master agreement for all services
Modification Number One	7/29/03	
Statement of Work Number 5	7/29/03	Upgrade STM Equipment to Aloha at Chapter Houses
Statement of Work Number 6	7/29/03	Aloha hub equipment and hub services
Statement of Work Number 7	7/29/03	Chapter House bandwidth
Statement of Work Number 8	7/29/03	Field service and remote support for 108 Chapter Houses
Statement of Work Number 9	7/29/03	UPS for cabinets at 108 Chapter Houses
Statement of Work Number 10	7/29/03	Additional satellite equipment for support
Modification Number Two	4/23/04	Department of Emergency Management (DEM) for internet & transmission services
Statement of Work Number 12 <sup>19</sup>	3/18/04	See above
Modification Number Three <sup>20</sup>	5/15/04	Internet & transmission services for 111 Chapter Houses
Statement of Work Number 13	5/15/04	Increases bandwidth to 128k/1.5 Mb
Modification Number Four	5/23/05	Office of President and Vice President (OPVP) for internet & transmission services
Statement of Work Number 15	1/1/05	See above

<sup>18</sup> See Exhibit 4.

<sup>19</sup> We have no documents indicating whether there was ever an SOW 11, or why the SOWs skipped from 10 to 12.

<sup>20</sup> First implication of E-rate funding (“No additional cost because of a one-time adjustment of services adjustment [sic] Prepaid Match Credit from OnSat of \$967,584 and Grants from Universal Access Fund of at least \$5,271,870.00”).

Modification Number Five	5/23/05	Department of Public Safety (DPS) for internet & transmission services
Modification Number Six	5/23/05	Department of Public Safety (DPS) for internet & transmission services <sup>21</sup>
Statement of Work Number 16	3/1/05	Connect to “Digital Equity Network” and connection for NCIC/AFIS systems
Modification Number Seven	7/15/05	Internet & transmission services, technical services
Modification Number Eight	9/12/05	DPS, Internet & transmission services
Statement of Work Number 17	8/29/05	Integrate DPS CODY/FATPOT systems into Digital Equity Network
Modification Number Nine	12/15/05	OPVP for internet & transmission services, updating SOW 15
Modification Number Ten	7/7/06	Internet & transmission services, updating budget on SOW 13
Statement of Work Number 14	7/1/06	Replaces SOW 7 and includes video conferencing
<b>Head Start</b>		
Head Start Contract (C22243) <sup>22</sup>	6/7/02	Phase I and Phase II of Head Start installation and connectivity, still refers back to Master Agreement for all terms and conditions
Statement of Work Number 2	5/30/02	Phase I, 6 regional offices, including supplying digital video broadcast
Statement of Work Number 3	5/30/02	Phase II, 205 centers installation and connectivity
Addendum Number One	7/2/02	Implement Phase II early by increasing budget by \$314,060.00 based on available money
Addendum Number Two	9/9/02	Add 14 additional sites to Phase II buildout by increasing budget by \$46,560.00
Addendum Number Three	6/6/03	Add 24 relay stations to Phase II buildout by increasing budget by \$116,400

<sup>21</sup> Same signature page as Modification Five, with “Five” scratched out and “Six” written on top. *See infra*, Section I.A.6 for a full discussion of this issue.

<sup>22</sup> Although a separate agreement was entered into for the Head Start sites (C22243), that agreement referred back to C22052 for all terms and conditions. Thus the discussion about limitations on the Nation’s right to object or receive refunds applies to the Head Start agreement as well.

Addendum Number Four	6/18/03	Webcast and video conference equipment
Statement of Work Number 8	6/18/03	See above. SOW was not signed.
Modification Number Five	1/5/05	Internet and transmission services to Head Start
Statement of Work Number 5	12/1/04	Phase III, Wireless transmission services between OnSat's satellite connection at each Navajo Chapter House and each Head Start School
Statement of Work Number 14	12/1/04	Phase III, 204 "Shared DVB Channel for Broadcast Receive". Same document as SOW 5 above, but listed under C22052.
Modification Number Six	1/5/05	Same signature page as Mod 5. Same services. Did not go through normal sign-off process.
Statement of Work Number 6	12/1/04	Same as SOW 5, other than inclusion of sheet showing E-rate amounts.
Modification Number Seven	Unsigned	Extension of "Addendum Six"

Under the Master Agreement (C22052) and the adjunct Head Start Agreement (C22243), the following Navajo Nation government entities were served, and according to records obtained as part of the Auditor's Special Review, the Nation directly paid OnSat the following amounts from each governmental entity:

**Table 2: OnSat Agreements Broken Down by Nation Department**

Government Department	Contract Modification/SOW	Total Paid by Nation to OnSat (2002-2007)
Department of Community Development (DCD)	Mod 1; SOW 5; SOW 6; SOW 7; SOW 8; SOW 9; SOW 10; Mod 3; SOW 13 Mod 7 Mod 10; SOW 14	\$1,192,892
Head Start (HS)	HS contract C22243 (still refers back to Master Agreement for governing provisions) HS SOW 2; HS SOW 3 HS Addendum 1 HS Addendum 2 HS Addendum 3 HS Addendum 4; SOW 8 HS Mod 5; SOW 14 HS Mod 6; SOW 6 HS Mod 7	\$2,399,529
Office of President and Vice President	Mod 4; SOW 15 Mod 9	\$143,964



(OPVP)		
Department of Public Safety (DPS)	Mod 5; SOW 16 Mod 6; SOW 16 Mod 8; SOW 17	\$1,451,907
Department of Emergency Management (DEM)	Mod 2; SOW 12	\$95,513
<b>Total</b>		<b>\$5,283,805<sup>23</sup></b>

As the chart indicates, the Nation has paid OnSat far more than the non-discounted share required under the E-rate program. Based on the discount factors employed in calculating E-rate payments, and payments actually made by USAC, the Nation was obligated to pay \$1,925,767.50 (\$1,558,567.50 for Chapter House Libraries and \$367,200.00 for Head Start sites) as its non-discounted share for years 2003-04, 2004-05, 2005-06, 2006-07. The total amount actually paid by the Nation during that period was \$2,882,764.36.<sup>24</sup> The discrepancy arises because OnSat billed different governmental entities for services, but all entities used the same “pipe” – the satellite uplink and bandwidth provided by OnSat under the Master Agreement.

The longer the Master Agreement remained in force, and the more it was modified, the more difficult it became for the Nation to exercise oversight and comply with Navajo law. Under Navajo Nation law, 2 N.N.C. § 164, multiple layers of Nation government have to approve contracts and contract modifications. Section 164(B) states:

B. Agreements not requiring Committee or Council approval:

2. Prior to final execution as provided in 2 N.N.C. §222, documents not requiring approval by resolution of the Navajo Nation Council or its committees shall be reviewed and signed by the following:
  - a. The appropriate Division Direct for departments and activities under his or her supervision;

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<sup>23</sup> Source: Special Review, p. 4.

<sup>24</sup> See Exhibit 7, summary spreadsheet of E-rate filings, contract, invoices and payments. The summary spreadsheet was prepared based on documents received from the Nation Auditors, Contract Administrators, and Ernest Franklin, as well as from the USAC database. As discussed herein, because all services provided by OnSat to the Nation were done under a single contract, “unscrambling the egg” has been quite difficult. The summary spreadsheet is our attempt at doing so. The first set of columns on the left (between the cyan shaded columns) tracks the Nation’s E-rate filings for each FRN, chronologically. Chapter House filings have a green background. Head Start filings have a yellow background. The second set of columns tracks all of the OnSat agreements. Again, Chapter House documents have a green background, and Head Start documents have a yellow background. Documents related to services for the Office of President and Vice-President (OPVP) have a gray background, and documents related to Department of Public Safety (DPS), and Department of Emergency Management (DEM), part of DPS, have a purple background. The next two sets of columns track invoices and payments related to the Chapter Houses, the two after that track invoices and payments related to Head Start, and the last two track all other invoices and payments. Only by laying out the E-rate filings, contract documents, invoices and payments in this manner that a true picture of the relationship between the Nation and OnSat fully emerge.

- b. The Controller (or designee) for all documents having a financial impact on the Navajo Nation; and
- c. The Attorney General of the Navajo Nation (or designee).<sup>25</sup>

As part of Exhibit 4, we have provided copies of the Section 164 Review Signature Approval Sheets (SAS) where they were available to indicate that in most instances the OnSat Agreement and modifications went through the review process prior to approval and implementation.<sup>26</sup> As more modifications and addenda were layered onto the Master Agreement, however, the chain of review appears to break down as the Nation apparently became confused as to what modifications had been approved, or even needed approval under the Section 164 Review Process. This confusion culminated in the Head Start Mod 6 issue, discussed below.

A memo from Arbin Mitchell, Acting Division Director, Division of Community Development to Isabelle Yazzie, Accounting Manager, Office of the Controller, dated January 11, 2006, highlights the problems inherent in trying to allocate charges from a common contract across several Nation departments.<sup>27</sup>

The common contract that is associated with all these purchases was the Onsat Master Agreement (Contract #C22052). Although initially, this contract was associated with the account K036005, the contract is a general contract with the Navajo Nation which allows any department to use it to conduct business with Onsat. Looking at several payment documents related to this contract, it appears that departments from various divisions are indeed using the contract for their own purposes.<sup>28</sup>

The Nation tried to limit any potential “free rider” problems by making clear, as to the Chapter Houses, that the OnSat connectivity was limited solely for the library use, and if a Chapter House wished to also use OnSat for administrative connectivity, it would have to pay OnSat separately.<sup>29</sup>

Please be aware that these funds are for community use only and any other use, such as administrative, will require additional funds. Therefore all chapters that wish to use that Internet connect for administrative purposes should budget \$35.00 per month. This amount is considerably less than what the local telephone company charges for broadband access at \$49.00 per month.<sup>30</sup>

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<sup>25</sup> 2 N.N.C. § 164(B)(2).

<sup>26</sup> *See, e.g.*, Exhibit 4, Mod 2.

<sup>27</sup> *See* Exhibit 8.

<sup>28</sup> *Id.*

<sup>29</sup> *See* Exhibit 9 (August 6, 2004, memo from Earnest Franklin to all Chapters).

<sup>30</sup> *Id.*

### **3. OnSat's Invoicing Procedures Led to Further Confusion**

OnSat's invoicing and collection procedures led to confusion and a lack of ability to account for payments and services. Invoices referred to the Master Agreement number (C22052), or on some occasions the Head Start agreement (C22243), but only intermittently to specific modifications (which as noted above, and below, were sometimes misnumbered), and were not always directed to the right department for processing and payment. Indeed, in one worst case, OnSat invoiced the Nation \$499,500.00 for "Annual Connectivity Services -- Contract X, Project Y."<sup>31</sup> The May 17, 2007 memo from Dr. Francis D. Becenti, Interim Department Manager, Navajo Head Start, to the Special Review (a copy of which USAC has), stated the following criticism of OnSat's invoicing:

"The Onsat invoice[s] were not detailed to identify what type of services rendered. The [Head Start] program requested detailed information to Onsat to validate the invoice; however, no information was received. The invoice was process[ed] and paid in good faith."

The Nation has specific processes for reviewing and paying invoices. In her Special Review, Elizabeth Begay described the process as follows:

Standard accounting practices require vendor invoices to be submitted independently to the approving authority, generally the department manager and accounting manager, for proper review and approval. Thereafter, the approved invoices should be sent independently to accounts payable for payment processing and when the check is prepared, it should be mailed directly to the vendor.<sup>32</sup>

As noted in the Special Review, and confirmed during GSB interviews at Window Rock, Arizona, OnSat in a number of cases circumvented invoice processing procedures and obtained payments of invoices that did not receive the proper review. "The Navajo Nation employees above told the auditor that OnSat owner came in person to submit his invoices. In addition, the employees were instructed by the Navajo Nation President Chief of Staff Patrick Sandoval to process OnSat invoices for payment."<sup>33</sup>

As part of the Special Review, the auditor also found that:

The accounting staff that processed the payments to OnSat did not systematically link the invoice payments to the contract. Without such linkage, payments to OnSat were being processed without assurance that the amounts paid were in accordance with the terms of the contract.

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<sup>31</sup> See Exhibit 10. It should also be noted that this is the *only* invoice that exactly matches the non-discounted portion for which the Nation was responsible. See *infra*, Section I.A.5 for a discussion of this.

<sup>32</sup> Special Review, p. 8.

<sup>33</sup> See Exhibit 11. Elizabeth Begay, the auditor on the Special Review authored the summary document contained in Exhibit 11 based on her interviews.

Consequently, OnSat was able to bill the Head Start Program approximately \$2.4 million, which was \$800,000 more than the \$1.6 million contracted for.<sup>34</sup>

In his November 11, 2006 response to USAC, Ernest Franklin, Executive Director, Navajo Nation Telecommunications Regulatory Commission, submitted copies of a number of checks to demonstrate that the Nation had paid its proper non-discounted share of the Chapter House services. Largely because of the problems described above, some of the checks submitted by Mr. Franklin do not relate to E-rate services to the Chapter House libraries. Specifically, a check issued May 26, 2005, in the amount of \$232,527 relates to services to the Nation Department of Public Safety; a check issued March 3, 2005, for \$37,023.63 does not relate to any invoice; a check issued December 22, 2004, in the amount of \$390,266.30 relates to a number of invoices, and only \$97,200 is clearly related to E-rate services; a check issued April 28, 2004, in the amount of \$29,159.64 relates to services to DPS; a check issued June 24, 2004, in the amount of \$51,960, was booked by Nation auditors to the Head Start account; and a check issued Mary 4, 2006, in the amount of \$24,653 relates to an OnSat invoice for Head Start services. In the Exhibit 7 spreadsheet, these items are depicted with a dark green background.

#### **4. E-rate Filings Are Not Supported by Either Contracts or Invoice/Payments**<sup>35</sup>

Detailed below are numerous instances of discrepancies between the amounts for which the Nation was obligated to pay OnSat under its contract, the OnSat invoices for the period, and the Nation's payments to OnSat.

##### **A. Funding Year 2003-2004**

Funding Year 2003-2004 was the first in which the Nation sought funding from the E-rate program. The FCC 470 (292180000448984) was posted on January 7, 2003, with an allowable contract date of February 4, 2003. The FCC Form 471 (FRN 1050114) was postmarked February 6, 2003, specifying a contract award date of February 5, 2003, and a service start date of July 1, 2003. Yet SOW 13, which sets forth terms and conditions for the services to be provided pursuant to E-rate funding, was executed by OnSat on March 15, 2004, and executed by the Nation on June 9, 2004, almost at the end of the funding year, and a full sixteen (16) months after Ernest Franklin certified that a contract was in place.<sup>36</sup>

The Nation's non-discounted obligation, the OnSat Invoices and the Nation's payment for that funding year do not match up:

Nation Obligation =	\$483,385.00
OnSat Invoices totaled =	\$334,040.11
Nation Payments =	\$146,669.97

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<sup>34</sup> Special Review, pp. 15-16.

<sup>35</sup> Numbers appearing in this section are derived from Exhibit 7, summary spreadsheet.

<sup>36</sup> Of course, there *was* a contract in place at the time the 471 was filed, the Master Agreement with Mod 5 then in place, but Mod 5 does not contain services and prices that match the E-rate support requested in the 471.

Ernest Franklin's spreadsheets and budget contain reference to an OnSat "credit" that remains unexplained.<sup>37</sup>

Finally, the second invoice to USAC of \$314,813 was submitted by OnSat on August 29, 2005, over a full year after the close of the fiscal year. Because the Nation had previously certified on Form 486 that it received all the services under the contract for that year, OnSat could further invoice USAC for an additional amount available to be funded.

### **B. Funding Year 2004-2005**

Again, the Nation's non-discounted share, as set forth in the FCC Form 471, the OnSat invoices, and Nation's payments don't match up:

Navajo Nation Obligation =	\$499,500.00
OnSat Invoices totaled =	\$610,349.77
Navajo Nation Payments =	\$221,038.77

### **C. Funding Year 2005-2006**

Funding year 2005-2006 was the only year that the Nation sought E-rate support for both the Chapter House libraries and Head Start Classrooms. A February 6, 2006 memo from head of the Nation's Head Start Program states that his department was not aware that the Nation was going to file for E-rate support for Head Start.<sup>38</sup> As in prior years, the Nation's obligation, OnSat invoices, and Nation payments don't match up:

#### Chapter Houses:

Nation Obligation =	\$333,000.00
OnSat Invoices totaled =	\$150,796.30
Nation Payments =	\$150,796.90

#### Head Start Centers:

Nation Obligation =	\$367,200.00
OnSat Invoices totaled =	\$530,454.00
Nation Payments =	\$527,674.00

### **D. Funding Year 2006-2007**

Funding year 2006-2007 was the last year for which we have full records. Again, the Nation's obligation, OnSat invoices and Nation payments don't match up:

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<sup>37</sup> See Exhibit 12.

<sup>38</sup> Exhibit 31 (to be supplied later).

Nation Obligation =	\$239, 682.16
OnSat Invoices totaled=	\$123,573.85
Navajo Nation Payments =	\$102,375.00

**Table 3: Summary of Obligations, Invoices, and Payments:<sup>39</sup>**

Matter	2003-2004	2004-2005	2005-2006	2006-2007	Total	Grand Total
Nation Obligation Chapter Houses	\$483,385.00	\$499,500.00	\$333,000.00	\$239,682.16	\$1,820,887.96	<b>\$2,188,087.96</b>
OnSat Invoices	\$334,040.11	\$610,349.77	\$150,796.30	\$123,573.85	\$1,218,208.38	<b>\$1,748,662.38</b>
Nation Payments Chapter Houses	\$146,669.97	\$221,038.77	\$150,796.90	\$102,375.00	\$620,880.64	<b>\$1,148,554.04</b>
Nation Obligation Head Start			\$367,200.00			
OnSat Invoices			\$530,454.00			
Nation Payments Head Start			\$527,674.00			

In reviewing the files of Mr. Franklin (*see infra*, Part II, response to Issue 7), we also discovered an Invoice, Number 6070115, dated July 1, 2006, for the amount of \$228,693.30.<sup>40</sup> This Invoice does not appear elsewhere in the Nation’s records and was not paid. The Nation’s non-discounted obligation for the 2006-2007 funding year was \$239,682.16, and OnSat separately invoiced DCD \$123,021.60, and the Nation paid \$102,375.00.<sup>41</sup> Attached to that Invoice in Mr. Franklin’s files was his Service Certification for SLD Invoices, dated June 12, 2007. In response to the question “Date Applicant Portion Paid and Check No. or Date will be Paid,” Mr. Franklin responded: “9/29/2006 Check numbers #714504-\$102,375 and #679035-\$148,500.00.”<sup>42</sup> Unfortunately, check #679035 was actually written July 7, 2006, and related to an Invoice from OnSat issued May 28, 2006, an relates to services provided for funding year 2005-2006.

## **5. Only One Set of OnSat Invoices Match E-rate Filings**

Only one set of OnSat invoices actually match the Form 471 filings with USAC.<sup>43</sup> Invoice Number 4070316, for \$2,830,500, is directed to USAC and represents the discounted amount of the services, presumably for the 2004-2005 funding year. Invoice Number 4070315, for \$499,500 is directed at the Nation, presumably for their non-discounted portion for the services to be provided in 2004-2005. It’s description states: “Annual Connectivity Services – Contract X, Project Y.” The Nation, however, ***did not*** pay this invoice, because,

<sup>39</sup> To the extent that the Nation payment figures differ from those in Table 2, this is because this table only addresses payments made in fiscal years 2003-2007, when the Nation received E-rate support.

<sup>40</sup> See Exhibit 38.

<sup>41</sup> See Exhibit 7, spreadsheet.

<sup>42</sup> Exhibit 38.

<sup>43</sup> See Exhibit 10.

as shown above, they were separately invoiced \$610,349.77 in 2004-2005. While we are at a loss to explain these invoices they clearly raise significant issues as to OnSat's invoicing practices.

## **6. Head Start Mod 6 Appears to be a Forged Document**

As part of its investigation, GSB received the agreements between the Nation and OnSat. Our review reveals what appears to be one forged document. Head Start Modification 5 (Mod 5)<sup>44</sup> has an identical cover page and signatures as Head Start Modification 6 (Mod 6).<sup>45</sup> Indeed, it appears that the number "FIVE (5)" on the cover page was scratched out and the number "6" written in.

Mod 5 was supported by SOW 5 and related to "Phase III" of the Head Start program. It bore a total cost of \$318,240.00, based on 204 sites and yearly charges for connection of \$1200, network infrastructure management of \$180, and computer support and software training services of \$180 per site. In addition to the signature page and SOW, the following documents that relate to Mod 5 are attached to Exhibit 13:

- A January 14, 2005, letter from Lucinda G. Davis, Senior Accountant, Contract Administration, OOC to David Stephens indicating that Mod 5 had been approved;
- A "Signature Approval Sheet" ("SAS") for Mod 5 signed off between 12/6/04 and 1/5/05;<sup>46</sup>
- A "Request for Services" related to Mod 5, dated 12/2/04, and signed off by a DOJ attorney on 12/29/04;
- A December 8, 2004, letter from J. Kaibah Begay, Department Manager, Department of Early Childhood Development, Division of Dine Education to Patrick Sandoval, Chief of Staff, Office of the President/Vice-President concerning "indirect costs."

In short, Mod 5 was approved through the Nation's normal contract review and approval process. Mod 6, by contrast, lacks any documentation indicating that it was processed, approved, and/or forwarded to OnSat for implementation. Both the Special Review auditor's files and the files of the Contract Administrator for Mod 6 contain only what is appended as Exhibit 14. We therefore conclude that Mod 6 was never signed by a qualified representative of the Nation nor approved through the SAS process.

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<sup>44</sup> See Exhibit 13.

<sup>45</sup> See Exhibit 14.

<sup>46</sup> The document bears a sign-off date for the Office of the President of "1-5-04" but it is safe to assume, given the other signatures, that the date should have been "1-5-05."

The cover page for Mod 6 (apparently an altered cover page for Mod 5) contains the same dollar figures and refers to SOW 5. Attached to the cover sheet for Mod 6 is SOW 6. SOW 6 designates a different contact person at the Nation,<sup>47</sup> and contains slightly different wording in the “Objectives” session, but otherwise is virtually identical to SOW 5. A comparison of the “Costs” section of SOW 5 and SOW 6 however, reveals that although both specify the same services, they specify strikingly different prices, as reflected in the table below.

**Table 4: SOW 5 and SOW 6 Cost Comparisons**

Description	SOW 5 Cost	SOW 6 Cost
Connection to the Digital Equity Network, Shared DVB Channel for Broadcast Receive	\$1200 per year per site	\$1,380 per year per site
Network infrastructure management	\$180 per year per site	\$180 per year per site
Computer support and software training services	\$180 per year per site	\$180 per year per site
Sites	204	204
Due upon acceptance of Statement of Work	“11 months less credit already paid”	“Discounted Amount” \$318,240.00
Services are Due at Service Start Date through the end of the Customer’s Fiscal Year	\$318,240.00	\$3,708,720.00

There is no explanation as to the source of the figure \$3,708,270.00, which represents a 11.6 times multiplier to the \$318,240 figure due under Mod 5, the same figure which appears in Mod 6 as the “Discounted Amount.”

Mod 6 represents one of only a few documents related to the contractual relationship between OnSat and the Nation that shows a distinction between what the Nation is responsible for paying and a much larger total contract cost. In his interview, Ernest Franklin explained that Mod 5 represented the Nation’s non-discounted portion of the contract, and Mod 6 represented the full contract cost. The problem with this explanation is that it deviates completely from the Nation’s prior practice, which was to reflect the total contract costs on its books, and to refer to E-rate funding as a source of funding to pay the contract.

Moreover, documents in the Contract Administration files refer to a different Head Start Mod 6.<sup>48</sup> That Mod 6 carried a cost of \$159,120.00 for providing VPN and other services and connectivity between the Head Start administration office and Head Start sites. This Mod 6 was never signed, and the Request for Services was never processed. In a memo of February 9, 2006, J. Kaibah Begay points out that “all the records to this contract were not

<sup>47</sup> The lead OnSat engineer specified in both SOW 5 and SOW 6 is Farrell Franklin, the brother of Ernest Franklin, Executive Director, Navajo Nation Telecommunication Regulatory Commission.

<sup>48</sup> See Exhibit 15. Note also that in his May 17, 2007 memo, Dr. Francis D. Becenti, Interim Department Manager, Navajo Head Start, references Mods 4, 5, and 7, but *not* Mod 6.



consistent, therefore, a meeting was arranged and the balance was agreed upon.”<sup>49</sup> The amount for Mod 6 was listed as \$318,240, or the amount listed in Mod 5, and the amount listed as the Nation’s non-discounted portion in Mod 6.

Finally, in submitting the FCC 471 for FRN’s 1347323 for 2005-2006 for Head Start connectivity and maintenance, Ernest Franklin responded to Block 5, question 15b, “Contract Number” by filling in “NNHSLC05.” For FRN 1347449 he entered “C22243.” There is no contract “NNHSLC05.”

Based on our review, it appears that the Nation never signed or approved Mod 6. Moreover, in the Head Start FRNs for 2005-2006 the total amount of the contract was \$3,672,000, a figure which is not consistent with any other figures. We now question the accuracy of those two FRNs, since they appear to have no basis in contract. Mod 6, the one contract that was close in terms of value (\$3,708,270 in Mod 6 versus \$3,672,000 reflected in the two FRNs) was never signed or approved by the Nation.

**B: There is a Substantial Question as to What Connectivity the Nation Received and Whether OnSat Charged the Nation More Than Once For the Same Connectivity**

A recurring theme of our investigation are questions about what connectivity the Nation received from OnSat, what the Nation actually paid for, and whether it was charged more than once for the same connectivity. Universally, people from the Nation noted that the system installed by OnSat for the Chapter House libraries initially worked very well, with excellent connect speeds. As more services were added, including Head Start usage, DPS, DEM, and OPVP support, more complaints arose about connect speed, outages, and OnSat response times to complaints.

**1. Complaints About Connect Speeds and Outages**

As part of this investigation, Norbert Nez, Computer Operations Supervisor for DCD, conducted an audit of Chapter Houses to determine what equipment had been installed, and what service provider (if any) was being used for the administrative portion of the Chapter House and for the library (computer lab) portion. As part of his report, Mr. Nez produced a number of memos dating back to 2006 and 2007 concerning the quality of OnSat services:<sup>50</sup>

“There are many occasions when the network is slow to extremely slow. . . I would like to see the quality of internet services improve in our rural Navajo Nation chapter communities.”<sup>51</sup>

“Our internet services here has been shutting on and off, even though we reboot the services. There are times it is out for the whole day.”<sup>52</sup>

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<sup>49</sup> Exhibit 16.

<sup>50</sup> See Exhibit 17.

<sup>51</sup> Exhibit 17, Memo from Gloria M. Skeet deCruz, CSC to “e-Rate Selection Committee Members, February 13, 2006 (Bread Springs Chapter).

“We had unreliable satellite services, and were unsuccessful in obtaining adequate or reliable customer support and technical support from OnSat.”<sup>53</sup>

“Inscription House Chapter has been without complete Internet service for about 2 months. . . Are we able to get credit? It’s a lot of down time for costly service not being provided.”<sup>54</sup>

“The satellite fed connectivity is slow and is unavailable about 35% of the time.”<sup>55</sup>

“Our problem is the level of consistent internet service currently provides is not adequate for our public access and chapter administrative needs.”<sup>56</sup>

“The Shiprock Chapter is extremely dissatisfied with the OnSat satellite service hooked up to Chapters across Navajoland. . . We would like the grant that covers payment to OnSat for poor quality service to be transferred to the Chapter so that we can provide DSL service to the Gates system. Further, word is that bandwidth is being (hogged) usurped by President Shirley’s campaign 2006. In other words, the grant funds to pay OnSat for Chapter satellite systems is now paying for President Shirley’s key staff’s home satellite installations where bandwidth are jacked up. Why should President Shirley’s staff have home satellite systems installed and not other members of the Navajo Nation? Surely the staff already has access to DSL in their office.”<sup>57</sup>

“At the time when the equipments and internet were installed, it was a lot better and faster login on. It may be that the bandwidth is not sufficient due to Head Start and other department connecting on to the same width. We still use it as the main line of communication to our chapter and a lot of

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<sup>52</sup> Exhibit 17, Memo from Melita Martinez, Office Specialist to Norbert Nez, Computer Operation Supervisor, February 13, 2006 (Chichiltah Chapter).

<sup>53</sup> Exhibit 17, Memo from Carol J. Davis, CSC to Arbin Mitchell, Division Director, Division of Community Development, August 21, 2007 (Dilkon Chapter).

<sup>54</sup> Exhibit 17, Memo from Victoria Bydone, CSC, to Norbert Nez, Computer Operation Supervisor, January 9, 2006 (Inscription Chapter).

<sup>55</sup> Exhibit 17, Memo from Nancy Chee, CSC to Norbert Nez, Computer Operations Supervisor, February 28, 2007 (Klagetoh Chapter).

<sup>56</sup> Exhibit 17, Memo from Herman Tso, CSC to Norbert Nez, Computer Operations Supervisor, June 27, 2007 (LeChee Chapter).

<sup>57</sup> Exhibit 17, Memo from Peter Deswood, CSC, to ERATE Selection Committee, February 13, 2006 (Shiprock Chapter).

community people use it. However, I feel that On-Sate needs to provide a better quality internet service to reservation communities.”<sup>58</sup>

Exhibit 17 also contains “speed tests,” conducted by the Newcomb, Shiprock, San Juan, and Hogback Chapters, that compare the throughput speeds of the OnSat system to Shiprock’s DSL connection, as of September, 2005, using two readily available testing algorithms. Those tests indicated that whereas the Shiprock DSL connection was performing as anticipated (~1 Mbps download and ~128 kbps upload), the OnSat system was significantly slower.

**Table 5: Connect Speed Tests**

Speed Test Run By Shiprock (kbps)							
	Speakeasy <sup>59</sup>	Megapath <sup>60</sup>	Average		Speakeasy	Megapath	Average
	Download	Download	Download		Upload	Upload	Upload
Shiprock DSL	909	915	912		104	105	104.5
Newcomb OnSat	61	81	71		13	50	31.5
Shiprock OnSat	120	108	114		12	39	25.5
San Juan OnSat		50	50			28	28
Hogback OnSat	132	125	128.5		36	4	20

## **2. The OnSat Agreements Do Not Clearly Specify the Bandwidth to be Supplied**

The various Modifications and SOWs drafted by OnSat are ambiguous, or purposely vague, with regard to what connectivity the Nation receives. In many of the modifications and SOWs, the term “Connect to OnSat’s ‘Digital Equity Network®’”<sup>61</sup> is all that is used to represent the amount of bandwidth available under that modification. SOW 14, the most recent revision of the OnSat agreement, says the following about bandwidth: “Upgrade connectivity to support Video Broadcast/Video Conference Services including 26+ MHz Bandwidth, Authentication, Filtering, Private Routing, 256k/1.5 Mb.”<sup>62</sup>

<sup>58</sup> Exhibit 17, E-mail from Sarah Lee, CSC, to Norbert Nez, Computer Operations Supervisor, February 16, 2006 (Sweetwater Chapter).

<sup>59</sup> See <http://www.speakeasy.net/speedtest/>.

<sup>60</sup> See [http://www.infomerchant.net/smallbusiness/dsl\\_speed\\_test.html](http://www.infomerchant.net/smallbusiness/dsl_speed_test.html).

<sup>61</sup> Although OnSat places a “R-circle” registration symbol after “Digital Equity Network,” a search of the US Patent and Trademark database reveals that OnSat’s trademark application, Serial Number 78029361 never achieved registration and was deemed abandoned by the PTO on September 28, 2001. According to the PTO, the registration symbol can only be used after a mark has been federally registered.

<sup>62</sup> See Exhibit 4, SOW 14, p. 4.

### 3. OnSat Offers Commercial Services For What Appear to Be Lower Rates than Those it Charged the Nation

OnSat Native American Services, Inc. (ONASI) offers connectivity on a commercial basis under the trademark EtherSat®.<sup>63</sup> ONASI is owned by OnSat. The ONASI/EtherSat offering and pricing is presented in a form that is much more standard than the way connectivity is described in any of the OnSat agreements with the Nation. Specifically, for two-way connectivity, the download and upload speeds vary, with download speeds generally much faster than upload speeds. The OnSat agreement with the Nation in most cases does not provide this level of specificity. Indeed, as noted above, it is extremely difficult to determine what bandwidth was provided to the Nation. Nonetheless, the following chart attempts to compare the bandwidth costs provided to the Nation with the costs ONASI offers to commercial customers.

**Table 6: Cost Comparison of OnSat/Nation Agreement and ONASI Pricelist**

OnSat Bandwidth Costs				OnSat Contract	ONASI/EtherSat
				With Nation	
Contract	Mod/SOW	Date	Speed	Cost/mo/site	Cost/mo/site
Chapter House					
22052	SOW7	7/29/2003	5mb of bandwidth, per user of 128k	\$316.44	\$149
22052	Mod3/SOW13	5/15/2004	1.5mb QOS (Average 3MB per user)	\$2,500.00	\$995
22052	SOW14	1/15/2006	126k/1.5 Mb to host video conferencing	\$950.00	\$583 <sup>64</sup>
22052	SOW14	1/15/2006	Satellite shared service	\$445.00	
22052	SOW14	1/15/2006	Total for SOW 14	\$1,395.00	
Head Start					
22243	SOW2 (HS Phase I)	6/11/2002	Not specified ("connect Customer to OnSat's Digital Equity Network")	\$18,000.00	
22243	SOW3 (HS Phase II)	6/6/2003	Not specified ("connect Customer to OnSat's Digital Equity Network")	\$30.00	
22243	SOW 5 (HS Phase III)	12/1/2004	Not specified ("Connection to the Digital Equity Network. Shared DVB Channel for Broadcast Receive")	\$100.00	
22243	Mod 6	12/1/2004	Not specified ("connect Customer to OnSat's Digital Equity Network"), discounted portion,	\$115.00	

<sup>63</sup> See <http://nnden.org/content.asp?CustComKey=59566&CategoryKey=111002&pn=Page&DomName=nnden.org>. A copy of that web page is attached hereto as Exhibit 18. No Federal trademark registration exists for EtherSat.

<sup>64</sup> \$583 figures based on advertised price of \$6,995 per year (\$6995 / 12 = \$583 per month).

			including Tandberg Video Conferencing)		
22243	Mod 6	12/1/2004	Not specified ("connect Customer to OnSat's Digital Equity Network"), <b>non</b> -discounted portion, including Tandberg Video Conferencing	\$675	
22243	Mod 6	12/1/2004	Total under Mod 6	\$790	\$583

It appears that the prices OnSat charged the Nation are substantially higher than those charged by ONASI/EtherSat for comparable commercial services offered. These are our "best guesses" as to comparable service. For a number of reasons, a precise comparison is not possible. For example, ONASI/EtherSat does not guarantee actual speeds. According to the ONASI/EtherSat website, "Actual Speed varies because all Plans are shared except the SCPC which is not shared. Users in the 2056Kbps up channel generally see between 700Kbps and 1.2 Mbps of actual throughput." When discussing why OnSat was the low bidder for the 2006-2007 cycle, OnSat President David Stephens insisted that the service provided to the Nation was not shared with other customers:

"It is also important to note that OnSat's service to the Chapters is not shared with other customers as other satellite vendors do. The bandwidth is dedicated specifically to Navajo Chapters. The total cost for the bandwidth is divided by the number of Chapters whether 70 Chapters or 110 Chapters."<sup>65</sup>

We note, however, that no additional bandwidth was specified in the Head Start agreements, nor in the modifications to the Master Agreement to allow the Office of President and Vice President (OPVP),<sup>66</sup> Department of Public Safety (DPS),<sup>67</sup> and Department of Emergency Management (DEM),<sup>68</sup> to connect into the "Digital Equity Network." As far as we can tell, all services were delivered from the same transponder OnSat leased from SES Americom.<sup>69</sup> Later Department of Community Development (DCD) and Head Start modifications, specifically reference "satellite shared service,"<sup>70</sup> and "Shared DVB Channel for Broadcast Receive."<sup>71</sup>

<sup>65</sup> Exhibit 6.

<sup>66</sup> See, e.g., C22052, Mod 4, SOW 15 (no charge for connectivity for video conferencing).

<sup>67</sup> See, e.g., C22052, Mod 5, SOW 16 (no charge for connection to the Digital Equity Network, only charge for hardware).

<sup>68</sup> See, e.g., C22052, Mod 2, SOW 12.

<sup>69</sup> See, e.g., Exhibit 33, OnSat Invoice No. 5032411, dated March 24, 2005 to DPS for 194 MHz Vehicle Digital Radios and "2 Years connectivity to OnSat Network (incl'd), Configuration, Installation and In-Vehicle Set-up (incl'd)," and Invoice No. 5062950, dated June 29, 2005 to DPS for 12 900 MHz Vehicle Digital Radios and "2 Years connectivity to OnSat Network (incl'd), Configuration, Installation and In-Vehicle Set-up (incl'd)."

<sup>70</sup> See C22052 SOW 14.

<sup>71</sup> See C22243 SOW 14.

Without access to the contract(s) between SES Americom and OnSat, it is impossible to know exactly what bandwidth OnSat leased from SES Americom, and whether OnSat increased the bandwidth as it provided additional service offerings to the Nation. Notwithstanding David Stephens's claims in June, 2006, it is unclear whether the Nation got dedicated bandwidth, and even less clear whether the Chapter Houses shared bandwidth with other Nation users. Only OnSat can answer those questions.

#### **4. If No Additional Satellite Bandwidth Was Provided to the Head Start Centers, Then Head Start "Connectivity Charges" are Equipment Leases**

Under the Head Start agreement, OnSat was to provide connectivity between the Chapter Houses and 204 Head Start locations. In Head Start SOW 3 (Phase II), entered into May 30, 2002, OnSat's commitment was described as:

- "BCb® system;<sup>72</sup> equipment and software necessary to connect Customer to OnSat's 'Digital Equity Network®'
- Wireless transmission services between OnSat's satellite connection at each Navajo Chapter House and each Head Start Site"<sup>73</sup>

Our on-site investigation determined that the link to the Chapter Houses was achieved through a wireless architecture over unlicensed frequencies.<sup>74</sup> OnSat maintains that it owns the equipment used for this link, and was provided as part of its service offering.<sup>75</sup>

"Regarding the equipment to be provided in Phase 2 – the equipment for the wireless service between the Chapter House and the Head Start buildings. This is part of the service being provided by OnSat and therefore the property of OnSat. This allows OnSat to maintain the latest updates to software and hardware as part of the connection service fee. Phase 2 of the agreement provides for an Installation Fee and a Recurring connection fee with OnSat providing the equipment to provide the service."<sup>76</sup>

If no additional satellite bandwidth was leased by OnSat for the provision of services to Head Start centers (see analysis above), and there was no separate airtime fee for the wireless connection because it was using unlicensed (free) bandwidth, then it appears that the "connectivity service fee" for Head Start is simply an equipment lease for the wireless

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<sup>72</sup> OnSat does not have a registered trademark for "BCb."

<sup>73</sup> See Exhibit 4, Head Start SOW 3, p.

<sup>74</sup> Exhibit 19, diagram of Head Start wireless system.

<sup>75</sup> Exhibit 20, e-mail from David Stephens to Tom Platero of Nation Head Start (we do not have the second page which contains Mr. Platero's question).

<sup>76</sup> *Id.*

equipment used to connect the Head Start centers to the Chapter Houses with the satellite transmission using the existing connectivity of the “Digital Equity Network.” If this is the case, then FRN 1347323 (2004-2005 Head Start Internet Access) may not have been eligible for E-rate support. It must be noted that these facts were not disclosed to the Nation as part of the contract documents, and this potential problem has come to the Nation’s attention only as a part of the current investigation.

**C. Head Start Could Not Have Received All of the Services in 2005-2006 because OnSat Shut Off Service for Some Period and the Head Start Centers were Shut Down by the Federal Department of Health and Human Services (HHS) During a Portion of that Period**

In funding year 2005-2006, E-rate approved and \$3,304,800 as the discounted amount available for services to the Head Start classrooms.<sup>77</sup> Mr. Franklin certified to USAC that Head Start had received all services under two FRNs (1347323 and 1347449). It is clear, however, that Head Start did not receive service from OnSat for all of the 2005-2006 funding year.

First, attached hereto as Exhibit 40 is a memo from J. Kaibah Begay, Department Manager III, Department of Early Childhood Development, Department of Diné Education, dated February 23, 2006. In this memo, Mr. Begay reported that OnSat had cut off service to Head Start two days before for failure of the Nation to pay OnSat’s invoices. We do not know exactly when service was resumed, but at least for a portion of the funding year, service was cut off.

Second, and more importantly, the Federal government’s HHS, which oversees the national Head Start program, shut down the Head Start Classrooms on May 2, 2006. The Nation received authorization to restart the Head Start program on August 1, 2006, and the Head Start Classrooms reopened in late August, 2006. However, this means that for the final two months of the 2005-2006 funding cycle, there was no one to receive the service provided by OnSat because Head Start was shut down.

**D. OnSat Urged the Nation to Meet Its Funding Obligations Though a Lease of Equipment Back to OnSat**

By January, 2006, the relationship between the Nation and OnSat was deteriorating. Although complaints about service were increasing, the Nation nonetheless entered into Mod 10, which committed it to four more years of OnSat service, with a total contract price since inception of over \$32,000,000. At this point several internal investigations began, which culminated in the Special Review report.<sup>78</sup>

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<sup>77</sup> See Exhibit 7.

<sup>78</sup> See Exhibit 21, January 30, 2006, memo from Laverne Buffalo, Accounting Technician, Fiscal Management Section, Department of Law Enforcement, to Janice Haskie, Contract Accounting Section, Division of Finance.

As the Nation was preparing its filings for the 2006-2007 funding year in early 2006, there was concern at DCD that it might not be able to identify the funds necessary to meet its obligation to pay the non-discounted portion of the OnSat contract. A “solution” was developed by David Stephens of OnSat, and conveyed to Arbin Mitchell, Division Director of DCD. Mr. Stephens’ e-mail instructed Mr. Mitchell to sign *that day* a letter committing DCD to provide the \$3,325 per Chapter House library per year in order to allow Ernest Franklin to file the FCC Forms 471 for the 2006-07 funding year.<sup>79</sup> Mr. Stephens noted in his e-mail to Mr. Mitchell that Norbert Nez was out of the office, but that Earnest Franklin was the E-rate designee for the Nation, and that the letter should be addressed to him.<sup>80</sup> Mr. Stephens attached a memo to the e-mail to Mr. Mitchell entitled “The Navajo Nation Library Consortium Matching Funds Solution.” In that memo Mr. Stephens proposed the following “solution”:

One of the methods to provide matching funds is for DCD to lease the DCD owned Aloha modems and equipment to OnSat for \$3325.00 per year per Chapter. OnSat would accept this if; in turn the DCD would agree to pay \$3325.00 per year per Chapter for Internet Services.

OnSat will use the equipment leased from DCD along with other OnSat owned equipment to provide Service to the Library and other Navajo organizations. Each of the other organizations/groups/individuals will provide for funding for their own bandwidth/service.

To enable the long term sustainability of Chapter connectivity, a lease agreement will be concluded between OnSat and DCD that will provide for OnSat’s payment of \$3325.00 per year per Chapter to DCD to lease the Aloha modem and equipment and DCD’s agreement to pay \$3325.00 per year for OnSat’s Service.<sup>81</sup>

Mr. Mitchell prepared and signed the letter as instructed by Mr. Stephens.<sup>82</sup> When Mr. Nez returned to his office, he was troubled by this “solution,” and requested that the Nation’s Attorney General’s office give its opinion as to whether such a lease would be legal under both Nation and Federal law.<sup>83</sup> Mr. Nez specifically pointed to the Form 471 Receipt Acknowledgement Letter from USAC and its admonition that under FCC rules, “Funds from an outside source . . . must not come directly or indirectly from your services provider(s)” or “Service providers may not waive the non-discount portion of the costs.”

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<sup>79</sup> Exhibit 22.

<sup>80</sup> *Id.* (note reference in e-mail to “Shirley Designation of Erate Ma[nager]”).

<sup>81</sup> *Id.*

<sup>82</sup> Exhibit 23.

<sup>83</sup> Exhibit 24, March 15, 2006, memo from Norbert Nez, Computer Operations Supervisor, DCD, to Dana Bobroff, Deputy Assistant Attorney General, Department of Justice.



On March 21, 2006, the Nation's DOJ responded, by pointing out a number of problems with the OnSat-proposed solution.<sup>84</sup>

- 1) "Arrangements such as what has been proposed, wherein the Nation receives a monetary reward for selecting a certain vendor, are highly suspect under both federal and Navajo Nation law and are not allowed under the Navajo Business Opportunity Act ('NBOA')."
- 2) "If scrutinized, the substance of the proposed arrangement, wherein OnSat would be selected as the service provider and On-Sat would provide the matching funds by leasing equipment from the Nation, would reveal that the match funds were indirectly received from a service provider in violation of the Form 471 prohibition."
- 3) "Under Navajo Nation Appropriation's Act, 12 N.N.C. § 820(K), any additional revenue received by the Nation, such as the revenue from a lease with On-Sat, is deposited in the General Fund unless otherwise specifically designated by Navajo Nation Council. Accordingly, the revenue from the On-Sat lease will be deposited in the General Fund and not available for DCD to use as matching funds until Council specifically enacts legislation to that effect."
- 4) "While DOJ's analysis is preliminary and based only on the information it has received so far, for the reasons stated above DOJ advises that the proposed arrangement not be pursued."

On June 27, 2006, Mr. Nez again questioned the status of the 2006-2007 funding situation in pointing out the DOJ had rejected the lease solution.<sup>85</sup>

The justification to award the e-rate contract was based on the availability of matching funds. These matching funds were supposed to come from revenues generated off of the use of Chapter equipment by OnSat. However, in a written opinion issued by DOJ, that option was not endorsed as a viable arrangement. What this means is that the original premise of availability of matching funds that the selection of the e-rate provider was based on is no longer valid. Does this invalidate the selection of the e-rate provider? Is the Navajo Nation entering into a contract with no identified funding source to support it as required by e-rate rules?<sup>86</sup>

In response, David Stephens of OnSat wrote a memo the same day addressing this issue:

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<sup>84</sup> Exhibit 25, March 21, 2006 memo from Dana L. Bobroff to Norbert Nez. Although the date of the memo in the title is March 21, 2005, the subsequent headers say "March 21, 2006," and the receive stamp states "April 3, 2006." From this it is safe to assume that the correct date of the memo is March 21, 2006.

<sup>85</sup> Exhibit 26, June 27, 2006 memo from Norbert Nez, to Arbin Mitchell.

<sup>86</sup> *Id.*

The Modification is still subject to finding matching (discounted funds) but does not obligate the Navajo Nation to a specific amount. There is a plan in place for purchasing equipment but it is a separate transaction. There has already been funding identified that supports E-rate rules.<sup>87</sup>

Several conclusions can be reached from this progression of documents. First, OnSat proposed a “solution” that violates E-rate rules. Second, Mr. Nez was concerned and diligent enough to seek legal guidance from DOJ. DOJ in a matter of a few days rendered its opinion that the lease “solution” was problematic on a number of fronts. When Mr. Nez again raised these issues to Mr. Mitchell, David Stephens responded *on the very same day*. Mr. Nez’s internal memo somehow got to OnSat immediately. Moreover, the mere fact that OnSat undertook to advise the Acting Director of DCD on a matter of internal funding shows thoroughly OnSat had imbedded itself in the Nation’s affairs.

Our investigation revealed no other documents related to the lease “solution,” nor have we found any indication that the Tribal Council approved the lease or the apportionment of lease funds to E-rate. A review of the documents, however, reveals that although the Nation’s obligation for 2006-2007 based on E-rate matching funding should have been \$239,682.16, in fact, OnSat invoiced the Nation only \$123,573.85 for Chapter House library services, and the Nation paid only \$102,375.00 from DCD. It is possible, therefore, that OnSat implemented a partial “solution” simply by not invoicing the Nation for the full amount of services.

## **Part II. Response to Specific Questions in October 22, 2008 USAC letter**

In this section, we respond to the questions posed in your October 22, 2008 letter. Your questions, organized as ten (10) specific issues, appear in **bold**; the Nation’s responses follow.

### **Issue 1: Special Review by Navajo Action Auditor General (pp. 7-8)**

**Question 1.1: Enclosed with this letter is a copy of the responses provided to USAC. We are uncertain [sic] as to whether these are the full and complete responses to the Review. If these constitute the full responses of the Navajo Nation to the Review, please inform us in writing. If these do not constitute the full responses of the Navajo Nation, please provide us with copies of the full responses, or explain why you are unable to.**

**Response:** As supplemented by this letter, the documents appended to your October 22, 2008, letter contain the complete response to the Special Review by the Nation departments involved. In addition, appended hereto as Exhibit 5 is OnSat’s response to the Special Review.

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<sup>87</sup> See Exhibit 6.

In reviewing the files of Mr. Franklin, we also discovered an additional “OnSat Response to A Special Review of the Navajo Nation Payments to OnSat” (“Second OnSat Response”). The Second OnSat Response is appended as Exhibit 41, and was sent to Mr. Franklin from OnSat’s Albuquerque litigation counsel. It bears a “received” stamp of May 15, 2007 from Mr. Franklin’s office so predates by approximately 30 days the more widely disseminated OnSat Response of June 8, 2007. We are unaware that anyone else at the Nation has seen this document, and it was not presented to the Attorney General’s office or to the Tribal Council in its review of the Special Review. We, therefore, do not know the exact origin of this document, whether it is a final document, or a draft. We nonetheless provide it to USAC for your review. Of particular note is OnSat’s response to the Special Review’s Finding II that the Nation contracts with OnSat were not effectively monitored. At footnote 1 on page 9, OnSat responds:

The question of competitive bidding ignores the reality of a proprietary system. Once a system is developed it must maintain a consistent and integrated technology, or the system will simply not work. This is best shown by cell phone technology. If you change cell phone service providers you throw away your old cell phone and buy a new one from your new service provider. If you add different hardware to the system, it simply will not work. If you obtain a new service provider, you must discard all of your old hardware and buy all new hardware. *The Gates Foundation recognized this when they specified that OnSat must remain the service provider as a condition of its grants to the Navajo Nation.*<sup>88</sup>

**Question 1.2:** At our September 12, 2008 meeting, you stated that you had determined which of the audit findings relate to the SLSM and which do not. For each finding in the Review, please provide an explanation of whether it relates to the SLSM, and the basis for your determination supported by appropriate documentation.

**Response:** The Special Review made four (4) general findings, with subfindings within each finding. These findings are discussed below to the extent they are relevant to E-rate participation by the Nation. It should be noted that when OnSat responded to the Special Review it specifically limited its response to Finding I and Finding IV, on grounds that the others were not relevant to it, or by implication, to E-rate participation.<sup>89</sup>

A. Finding I: Circumventing of Controls Led to Hundreds of Thousands of Dollars in Improper and Questionable Payments to OnSat.<sup>90</sup>

Subfinding I(A): Established controls were circumvented in processing payments to OnSat.<sup>91</sup> This issue related to E-rate participation and is discussed *supra* at Part I.A.3. Remedial measures recommended to the Nation are discussed *infra* Part III.

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<sup>88</sup> Exhibit 41, p. 9, n.1 (emphasis added).

<sup>89</sup> See Exhibit 5 (OnSat Response to Special Review), p. 1.

<sup>90</sup> Special Review, p. 8.

Subfinding I(B): Overbilling for Head Start sites, connectivity.<sup>92</sup> This impacts E-rate participation. We disagree with the Special Review conclusion that the Nation should be charged only for 135 Head Start Sites. From the documents we have reviewed, there were 204 *classrooms* connected by OnSat, and that is consistent with the contractual requirement. However, as noted above in Part I.B, whether the Head Start contracts were valid service agreements or disguised equipment leases is unclear and cannot be determined without a full analysis of OnSat's data and contracts with SES Americom as to the bandwidth it leased and delivered. Moreover, to the extent that data from multiple classrooms were carried over a single wireless connection, the quality of service would vary significantly.

Subfinding I(C): Overbilling for Head Start sites, installation.<sup>93</sup> The Special Review found that Head Start was obligated to connect 233 Head Start locations, and that it connected only 204. We conclude that since this installation occurred prior to the Nation's participation in the E-rate program for Head Start, it does not implicate E-rate participation. When the Nation applied for E-rate funding for the Head Start classrooms in 2005-2006, it designated 204 receive sites.

Subfinding I(D): Double billing for Head Start. Because this relates solely to OnSat's invoicing of the Nation for its portion of the non-discounted rate, it does not have direct E-rate implications. We agree that the Nation paid more to OnSat for the Head Start connections than was required under the contract. As noted above, systemic problems in OnSat's invoicing process appear to overpayment for the Head Start connections.

Subfinding I(E): Billing for Chapter Houses that no longer took the OnSat service. This implicates E-rate issues. OnSat's position is that the Nation was bound by the contract for the bandwidth it purchased, regardless of how many Chapter Houses were actually connected.<sup>94</sup> The Nation is determining whether to seek reimbursement from OnSat based on the actual Chapter Houses that received service, but because recordkeeping at the Chapter Houses was is perfect, it may be difficult to prove exactly when each Chapter House received service from OnSat or when it ceased to be receive OnSat services.

Subfinding I(F): Out-of-service credits.<sup>95</sup> This implicates E-rate participation and is discussed fully in Part I.A.1.

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at pp. 8-9.

<sup>93</sup> *Id.*, pp. 9-10.

<sup>94</sup> See Exhibit 6 (Stephens memo of June 27, 2006, stating "The total cost for the bandwidth is divided by the number of Chapters whether 70 Chapters or 110 Chapters").

<sup>95</sup> *Id.*, p. 10.

Subfunding I(G): Payments for goods/services not rendered.<sup>96</sup>

- i. Special Diabetes Program. This related to payments for a website that was allegedly not delivered and does not implicate E-rate participation.
- ii. Dish alignment equipment. This was not purchased with E-rate funds and therefore does not implicate E-rate participation.

Subfunding I(H): Unnecessary purchases.<sup>97</sup>

- i. Head Start software. These purchases were made with Gates Foundation grant money and do not implicate E-rate participation.
- ii. Head Start wireless cards. These were purchased with Gates Foundation grant money and do not implicate E-rate participation.
- iii. DPS purchase of Software. This purchase was made with other Federal grant money (COPS) and does not implicate E-rate participation.

B. Finding II: Contracts with OnSat were not effectively monitored.

Subfunding II(A): OnSat contracts were poorly managed.<sup>98</sup> This implicates E-rate participation and was discussed fully *supra* at Part I.A.2.

Subfunding II(B): Programs did not effectively evaluate the merit of contract costs.<sup>99</sup> This implicates E-rate participation and is discussed *infra* in response to Issue 7.

Subfunding II(C): Lack of accountability over items purchased from OnSat.<sup>100</sup> This finding relates to hardware purchased with Gates Foundation money and generally has no E-rate implications. To the extent that the lack of equipment to receive service does implicate E-rate participation, it is discussed *infra* in response to Issues 2 and 5.

C. Finding III: Poor use of Navajo Nation Information Technology Resources.<sup>101</sup>

Subfunding III(A): Lack of IT leadership resulted in poor use of Navajo Nation resources. This is an internal matter to the Nation and does not have direct E-rate implications.

Subfunding III(B): Unwarranted purchases. This finding relates to money Head Start paid to OnSat for connections for OPVP. We disagree with this particular finding in that OPVP operations with OnSat were supported by a separate contract modification not supported by E-rate funding.

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<sup>96</sup> *Id.*, pp. 11-12.

<sup>97</sup> *Id.*, pp. 12-13.

<sup>98</sup> Special Report, pp. 15-16.

<sup>99</sup> *Id.*, p. 16.

<sup>100</sup> *Id.*, pp. 16-18.

<sup>101</sup> *Id.*, p. 19.

Subfunding III(C): No competitive procurement.<sup>102</sup> This implicates E-rate participation is covered elsewhere in this response.

Subfunding III(D): DIT's role in the Navajo Nation IT decision-making is minimal.<sup>103</sup> This is an internal structural matter of Nation policy and does not have any direct E-rate implications.

D. Finding IV: E-rate support for funding year 2003 was not fully disclosed to the Navajo Nation.<sup>104</sup>

Subfunding IV(A): Navajo E-rate representative did not ensure that the E-rate support for funding year 2003 was passed on to the Navajo Nation.<sup>105</sup> We do not agree with this finding and do not believe the auditor fully understood the E-rate process. The \$314,814 received by OnSat pursuant to a year-end true-up was for the discounted portion of the service and supported by E-rate money, and should not have been transferred or otherwise shared with the Nation.

Subfunding IV(B): Appearance of a conflict of interest. This does have E-rate implications and we discuss it elsewhere in this response.

**Question 1.3: Please explain whether your investigation has revealed whether any funds need to be repaid to the SLSM as a result of the findings in the Review. If any amounts need to be repaid, please provide a complete accounting of the amounts you have determined need be repaid based on the audit work that was performed so that USAC can seek recovery of those amounts.**

**Response:** Based on the facts available, we are unable to determine whether any amounts need to be repaid to USAC. As described above, under the terms of the contract with OnSat, the Nation's ability to object to service outages and receive credits was extremely limited. It is OnSat's position that the services were contracted for on a fixed fee basis, regardless of the number of actual sites receiving service or the amount of bandwidth actually used. The Nation also did not and does not have the technical ability to determine whether the bandwidth it was paying for was actually delivered.

**Question 1.4: With regard to the conflict of interest issue identified in the Review, please explain Mr. Ernest Franklin's role with respect to the Navajo Nation's pending FCC Form 471 applications to USAC, and how that role is consistent with the Navajo**

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<sup>102</sup> *Id.*, p. 20.

<sup>103</sup> *Id.*, p. 21.

<sup>104</sup> *Id.*, p. 23.

<sup>105</sup> *Id.*, p. 23.

**Nation's response to the audit finding. Please describe in full Ms. Lee's role with respect to the Navajo Nation's pending FCC Form 471 applications to USAC.**

**Response:** Mr. Franklin was the Nation's E-rate coordinator up until he was replaced by Ms. Lee in late 2006 following the release of the Special Review. Although the Nation does not believe that there is an inherent conflict of interest in having the head of the Telecommunications Regulatory Committee be the point of contact on E-rate matters, it was decided that because of the potential appearance of a conflict of interest, E-rate responsibilities should be moved elsewhere.

Ms. Lee is the point of contact at the Nation for E-rate matters and is backed up a team that initially included Mr. Franklin for the 2007-2008 E-rate filings (because of his past experience and knowledge of the Nation's E-rate participation, as well as Norbert Nez, Teralynn Begay, Irving Nelson of the Navajo Nation Library Services, Linda Curtis, Richard Morgan (for 2007-08) and Sylvia Jordan from DCD (for 2008-2009).

**Question 1.5: In addition, please provide information and supporting documentation regarding the steps the Navajo Nation has taken to implement the recommendations at page 14 of the Review. For example, what process has the Navajo Nation put in place to ensure that USAC is billed only for services actually provided at each eligible site? What process has the Navajo Nation put in place to monitor and report on service interruptions? When were these processes put in place? How is compliance with these processes monitored? To date, the Navajo Nation's responses to these questions have consisted of a general description of their policies, and to refer to their service provider's monitoring of services. So that USAC can be assured that the Navajo Nation has adequate policies and procedures in place to ensure that USAC pays only for services actually provided at each site, please provide detailed information about the Navajo Nation's policies and procedures.**

**Response:** See Part III below.

## **Issue 2: Overbilling and Delivery of Service (pp. 8-9)**

**Question 2.1: USAC has been unable to determine whether the Navajo Nation received in full the goods and/or services for which SLSM support has been sought in the invoices pending with USAC based on the information provided. Please confirm that the spreadsheet entitled "usage\_statistics\_NNation" responded to this request. If it did, the information provided is incomplete. For example, the measurement unit for the Total Usage column, as well as columns E (SUM(TCP RX) through I (6 month AVG) was not provided, the definitions for the column headings for columns E-M were not provided, and receipts supporting the receipt of video conferencing equipment at each site was not provided.**

**Response:** As indicated *supra*, Part I.A.1, the Nation has no technical ability to collect data as to overall system usage and connections. Only OnSat has those data. The spreadsheet

“usage\_statistics\_NNation” appears to have been created by OnSat. As such, the Nation is unable to respond to your question as to what certain column headings mean.

To determine whether the Nation maintained the equipment necessary to connect to the OnSat system and receive the services contracted for, Norbert Nez, Computer Operations Supervisor, Division of Community Development, supervised an audit of all Chapter Houses that compiled a current list of all equipment and verified service providers. The results of this audit are contained in Exhibit 17 (taken together, the “Nez Report”). A summary of the status of the Chapter Houses, prepared by undersigned counsel, is contained in Exhibit 27.

Mr. Nez’s audit confirms that the Chapter Houses received the Gates computers, and have, in almost every instance, maintained them. The audit also reveals that all Chapter Houses received the necessary video conferencing equipment (designated by the manufacturer “Tanberg”) that were the subject of Mod 10/ SOW 14, except for five (5) Chapter Houses (Beclabito, Coalmine Canyon, Crownpoint, Nageezi, and Tuba City). From an equipment standpoint, the Nation has demonstrated that it is capable of receiving service from OnSat.

The current state of service provider for connectivity for both the administrative side of the Chapter Houses, and the Chapter House Libraries is depicted in Table 7 below.

**Table 7**

**Summary of Current Connectivity to Chapter Houses**

October, 2008

	Admin	Library
Frontier DSL	50	32
Frontier Dial Up	8	0
Wild Blue	6	6
Hughes Net	1	1
Qwest	1	0
NNDIT	1	1
Verizon Wireless	1	0
Table Top	2	2
Sacred Wind DSL	1	0
Sacred Wind Dial up	4	0
Cibola	1	1
OnSat	17	4
None	14	57

**Question 2.2: USAC also requested a certification that for each site for which OnSat provided services and for which payment is sought in the pending invoices, the site was operational during the time frame that the services were provided related to the invoices pending with USAC. USAC has reviewed the information and documentation provided by the Navajo Nation, and has not identified a response to this request.**



**Response:** Except as noted in the Nez Report, to the best of the Nation's understanding and belief, the sites were operational during the time frame the services were to be provided by OnSat.

**Question 2.3:** Please provide documentation supporting the receipt of services at each site for which funding has been provided for all funding years so that USAC can determine whether the Navajo Nation received in full the goods and/or services for which SLSM support has been provided, and for which support has been sought in the invoices pending with USAC.

**Response:** The Nation does not have documentation to respond to this question, other than to say that the Nez Report provides the current state of the Chapter House equipment and ability to receive services. Only OnSat has the data as to exactly what connectivity was provided to each Chapter House.

**Issue 3: Cost Effectiveness (p. 9)**

**Question 3.1:** USAC sought documentation to support the Navajo Nation DINE's certification on its Funding Year 2006 applications that "[a]ll bids submitted will be carefully considered and the bid selected will be the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals." USAC reiterates this request, and requests that this documentation be provided for Funding Years 2003 to date for all funding requests associated with OnSat.

**Response:** See *infra*, response to Issue 7 regarding competitive bidding and the manner in which the Nation chose its provider. See also *supra*, response to Issue 1 as to OnSat's position on its rights as the incumbent carrier.

**Issue 4: Eligibility of Chapter Houses (pp. 9-11)**

**Question 4.1:** The Navajo Nation's responses to date do not provide sufficient information to determine whether Chapter Houses have more functions than just being a library. The May 12, 2008 letter from Navajo Nation states, "Following a visit to several Navajo communities, the Gates Foundation agreed to that the sole common public structure, called the community chapter house, was the location to establish the beginnings of a community public library." USAC needs to verify whether, for all funding years, the goods and/or services funded by the SLSM were provided only at eligible entities and used only for eligible purposes based on reliable documentation. USAC therefore reiterates our request as stated in our April 14, 2008 letter:

1. For each Chapter House site that has received SLSM funding since Funding Year 2003, provide the following:
  - a. Describe the functions of the Chapter House site.
  - b. Describe the activities that take place at the Chapter House site.

- c. Describe any function and activities that are not eligible for funding under the FCC's rules described above.
- d. If any function or activities are not eligible, provide the cost allocation between the portion of costs that are eligible and the portion that are ineligible.
- e. Explain whether the Navajo Nation's applications requested funding for the entire telecommunications and Internet access costs incurred at each Chapter House site in each funding year for Funding Years 2003 to date. If the Navajo Nation's applications did not request funding for the entire costs, provide a breakdown of the costs.

**Response:** In prior responses to USAC inquiries, Ernest Franklin has provided substantial information concerning the designation of Navajo Chapter Houses as libraries that will not be repeated here. The Nation agrees with Mr. Franklin's submissions on this point, including the providing of library designation letters from both the States of Arizona, New Mexico, and Utah. We were frankly surprised by your suggestion at our Meeting that the Chapter Houses might not qualify for support because they don't "look" like libraries.

When the Bill and Melinda Gates Foundation sought appropriate locations where computers could be located and made available to the public, the Chapter Houses were the only suitable sites.<sup>106</sup> The Gates Report had this to say about the Chapter Houses and their suitability as libraries:

Each Chapter House is the site of community gatherings, meetings, events, and the place local residents vote. The Chapter House also serves as the "county seat" for the elected officials and the government employees who deliver services to the Navajo people. Recently, a change in Navajo Nation leadership resulted in the endorsement of a local empowerment movement designed to give more autonomy to the local Chapter Houses as they seek to improve their local economies.<sup>107</sup>

In order to introduce Navajo tribal members to the technology so that they could consider participation in the Program, the Project Coordinator for NAATP met with an official from every Chapter House and made a presentation which included a demonstration of the machines. She reports that 'Interest became intense when elders saw and heard the machines speaking Navajo.' She had installed the Navajo Language Sentence Machine program. The demonstration proved so successful that all 110 Chapter Houses decided to participate in the NAATP, a first time – many say – that all Chapter Houses have agreed on anything! Computer savvy members hope using the Navajo Language program will encourage community members to experiment with other software as well.<sup>108</sup>

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<sup>106</sup> See Exhibit 1.

<sup>107</sup> *Id.*, p. 9.

<sup>108</sup> *Id.*, p. 17.

Choosing the 110 Chapter Houses as the places to be designated libraries made perfect sense. As reported above, the Chapter Houses are the central gathering point for communities of Navajos, similar to the way that public libraries are. In addition to government meetings, classes are taught, and other community meetings are held at the Chapter Houses. There simply are no other buildings on Navajo land that could serve this purpose.

To understand the challenge the Gates Foundation and Nation had in finding the best place to designate as libraries, one can compare the Nation to the two U.S. States that most resemble it in size, and the District of Columbia. As the table below demonstrates, the Nation's population density is 10-20 times lower than its nearest states in size, and 1000 times lower than the District of Columbia. Yet the 110 Chapter House libraries roughly coincide with the number of library and library branches in South Carolina and West Virginia. Neither of these states has the luxury that the District of Columbia enjoys, where there is a library branch for every 2.4 square miles.

**Table 8: Comparison of Nation Size and Population to Other States and D.C.**

	Navajo Nation	South Carolina	West Virginia	District of Columbia
Size (miles squared)	26,111	31,117	24,231	68.3
Population (in area)	~180,000	4,321,249	1,818,470	581,530
Pop per square mile	6.9	139	75	8514
Counties/Chapters	110	46	55	1
Pop per county	1,591	93,940	33,063	581,530
Public Libraries	110	180 <sup>109</sup>	175 <sup>110</sup>	28 <sup>111</sup>
Square miles per Library	237	173	138	2.4

Installing the Gates Foundation computers and transforming the Chapter Houses into libraries was not without both problems and great benefits, as documented by the Gates Report:

An interesting development related to the NAATP grants is the occurrence of new buildings and/or renovations in tribal communities buildings, often prompted by the need for space for the Gates computers. Many communities have leveraged funds from other organizations or from Tribal Councils to pay for long overdue renovation projects or additions. The ever-changing space situation sometimes facilitates and sometimes impedes the effective placement of the NAATP computers. By sheer coincidence, for example, the Baca Chapter House replaced its community building, which was destroyed following a gas leak, shortly before the NAATP computers arrived. Other

<sup>109</sup> Source: <http://www.publiclibraries.com/southcarolina.htm>.

<sup>110</sup> Source: <http://www.publiclibraries.com/westvirginia.htm>.

<sup>111</sup> Source: <http://www.publiclibraries.com/dc.htm>.

communities have not renovated but have managed to fit the Gates computers in small areas that are at best cozy, but mostly crowded.<sup>112</sup>

As the images in Exhibit 27 show, the Navajo Chapter Houses vary radically in terms of size, condition, and architecture. They may not “look” like traditional libraries, but they perform the key functions of cultural preservation and perpetuation. For example, until 150 years ago, Navajo was a purely spoken language. The first appearance of the Navajo language in any written form appeared in 1849, and then only by outsiders.<sup>113</sup> A uniform Navajo alphabet was not developed until 1939, so book publishing in the native Navajo language has been possible for only slightly more than 50 years. It should, therefore, come as no surprise that these libraries do not contain large collections of books.

Yet the Chapter Houses remain the only viable locations to preserve Navajo culture and provide internet access for the community. The Gates Foundation, the Nation, and other Federal and state funding support have invested heavily in their construction, modification, installation, and maintenance as libraries. The FCC has been briefed numerous times on issues related to the Chapter Houses as the “hub” for community access to the Internet.<sup>114</sup> There is no basis for questioning the eligibility of Chapter Houses as libraries at this point or for second-guessing the Nation’s decision to use Chapter Houses as the repositories of Navajo culture.

As the Nez Report shows, the Chapter House connectivity functions are broken up between “Administrative” and “Lab (libraries)”. This has always been the case. In an August 6, 2004, memo from Ernest Franklin to each of the Chapter Houses, he made clear that the OnSat service provided to the Chapter House was for library purposes only, and that if any Chapter House wanted to use OnSat for administrative or other government services, they would have to contract for that separately.<sup>115</sup> The Nez Report shows that as of October, 2008, the Chapter Houses each have chosen their own providers for administrative services.

**Question 4.2: Include in your response whether the Internet access funded by the SLSM is made available to community members outside of library hours. Include in your response whether Internet access funded by the SLSM is used by ineligible entities and/or by eligible entities for ineligible purposes.**

**Response:** We have no hard evidence that members of the Nation use the Chapter House WiFi connections to access the Internet after normal Chapter House hours, only anecdotal stories. Nonetheless, we are not aware of any rule or precedent that would preclude the Chapter Houses from leaving open these connections for community use. The remoteness of the area, the distance that Nation members have to travel in order to get to a Chapter House,

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<sup>112</sup> Exhibit 1, Gates Report, pp. 17-18.

<sup>113</sup> See <http://www.omniglot.com/writing/navajo.htm>.

<sup>114</sup> Exhibit 28, “How the Navajo Nation Department of Head Start is using technology to help build a sustainable community while maintaining traditional values.” Available at the FCC’s website: <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf>.

<sup>115</sup> Exhibit 9.

and the limited alternatives for Internet access available to Nation members, all counsel in favor of allowing community use outside library hours. OnSat connectivity was also available for public safety use pursuant to Mod 5/SOW 16, and paid for by DPS separately, subject to the caveat in Part I.D, *supra*, and in response to Question 4.3, *infra*.

**Question 4.3: I am concerned that in a telephone conversation between myself and a representative of the Navajo Nation on July 14, 2008, I was informed that OnSat planned to turn service off at five police stations, among other locations, and was asked what USAC could do to avoid that from occurring. If USAC is providing funding for service at police stations, this constitutes ineligible use of SLSM funds by an ineligible entity. Other examples of ineligible use by ineligible entities include use by government officials for governmental duties, use by police officials for police duties, use by health care providers for the provision of healthcare services. USAC requests that you provide a full and complete answer as requested above so that we can determine whether any cost allocation needs to be performed.**

**Response:** As fully discussed *supra* in Part I.A.2, all of the Nation's services from OnSat ultimately used the same "pipe" – satellite capacity OnSat leased from SES Americom. When SES Americom threatened to shut down, and ultimately did shut down OnSat's connectivity for OnSat's nonpayment, Chapter House libraries and other Nation departments lost service. Services to other Nation departments were provided under the same Master Agreement that initially delivered services to Chapter House libraries, but under different modifications and SOWs.<sup>116</sup> OnSat provided services to DPS under Mods 5, 6, and 8, and DPS separately paid OnSat \$1,451,907 for those services. Department of Emergency Management (DEM) was provided service by OnSat under Mod 2, SOW 12, and separately paid OnSat \$95,513.

The services provided by OnSat to these agencies, however, were not primary emergency communications between "first responders." The Division of Public Safety and Department of Emergency Management has relied, and will continue to rely, primarily on 800 MHz trunked 2-way wireless radio facilities to provide public safety communications to police, fire, EMS and other first responders. Thus, services provided to the Nation's residents by the Division of Public Safety or Department of Emergency Services were not be substantially harmed by the termination of SES Americom services to OnSat.<sup>117</sup>

In our the on-site interviews, the Department of Emergency Management (DEM), and the Department of Public Safety (DPS), each indicated that neither of their departments had ever relied on OnSat for the provision of critical emergency services. They used OnSat only for the filing of routine reports by connecting to the OnSat system via wireless connections at the Chapter Houses, paid for with a U.S. COPS grant.<sup>118</sup>

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<sup>116</sup> See *supra*, Table 2.

<sup>117</sup> See Exhibit 34, explanation of DPS 900 MHz wireless link to Chapter House Hot Spot.

<sup>118</sup> See Exhibit 32 (April 28, 2005 letter from U.S. Department of Justice approving COPS Technology Grant to fund "installing onset [sic] wireless and satellite network under the COPS Technology grant award").

**Issue 5: Head Start “libraries” (pp. 11-12)**

**Question 5.1:** The Navajo Nation provided a list of head start centers and the geographical location of the center. These responses do not, however, provide clarity as to which are the SLSM eligible entities for the Navajo Nation Head Start Consortium. For example, were libraries established at each of the Head Start Centers? If so, did the facilities also continue to function as Head Start Centers? The list of Head Start Centers did include address information but did not include the requested information concerning the individual or group in charge of or responsible for the site. USAC reiterates our request, as stated in our April 14, 2008 letter: provide a complete description of all the functions and activities at each Head Start site, whether they relate to Head Start or not.

**Response:** The Navajo Nation Department of Head Start is sanctioned by the U.S. Federal government’s Department of Health and Human Services (HHS). As the Navajo Nation Head Start website makes clear, the Navajo Head Start program functions as most other Federally approved Head Start programs:

Head Start and Early Head Start are comprehensive child development programs which serve children from birth to age 5, pregnant women, and their families. They are child-focused programs and have the overall goal of increasing the school readiness of young children in low-income families.

The Head Start program is administered by the Head Start Bureau, the Administration on Children, Youth and Families, Administration for Children and Families, Department of Health and Human Services. Grants are awarded by the ACF Regional Offices and the Head Start Bureau's American Indian - Alaska Native and Migrant and Seasonal Program Branches directly to local public agencies, private organizations, Indian Tribes and school systems for the purpose of operating Head Start programs at the community level.

The Head Start program has a long tradition of delivering comprehensive and high quality services designed to foster healthy development in low-income children. Head Start grantee and delegate agencies provide a range of individualized services in the areas of education and early childhood development; medical, dental, and mental health; nutrition; and parent involvement. In addition, the entire range of Head Start services is responsive and appropriate to each child's and family's developmental, ethnic, cultural, and linguistic heritage and experience.

All Head Start programs must adhere to Program Performance Standards. The Head Start Program Performance Standards define the services that Head Start Programs are to provide to the children and families they serve. They constitute the expectations and requirements that Head Start grantees must meet. They are designed to ensure that the Head Start goals and objectives are implemented

successfully, that the Head Start philosophy continues to thrive, and that all grantee and delegate agencies maintain the highest possible quality in the provision of Head Start services.<sup>119</sup>

The Navajo Nation Head Start program is broken into five districts. Attached hereto is the current organizational chart of the NNHS program, with contact information of each district head.<sup>120</sup>

The Nation's plan to connect wirelessly the Head Start classrooms to the existing OnSat system was presented to the FCC, and that presentation still resides on the FCC's website.<sup>121</sup> The FCC has been extremely supportive of the Nation's efforts to "bridge the digital divide," and has never suggested that the Head Start classrooms might not be eligible for E-rate support. When the Nation submitted its FCC Form 471 seeking E-rate support for FY 2005-2006, it did so under the name of Head Start. This 471 was approved, and moneys paid out to OnSat over 15 months ago without the issue of basic eligibility ever arising.

Following deployment of the wireless system to connect the Head Start classrooms, they remained as classrooms and have continued to function in that role, except as noted above when the classrooms were shut down for a time by HHS.<sup>122</sup> A listing of the Head Start computers is contained as part of Exhibit 5, OnSat's Response to the Special Review. Exhibit K to OnSat's Response has been reviewed by the current leadership of the Nation Head Start program and they agree that it provides a fair representation of the computers used in Head Start Classrooms in 2005-2006 when the program received E-rate funding for connectivity.

**Question 5.2: The Navajo Nation did not provide a copy of the statute which supports the eligibility of Head Start Centers under the FCC's SLSM rules. Please provide a copy of the Navajo Nation law, if any, that defines elementary education to include prekindergarten and/or Head Start centers specifically.**

**Response:** The Navajo Nation Department of Head Start is sanctioned by the U.S. Federal government's Department of Health and Human Services (HHS). In the year 2000, for example, HHS provided over \$5.2 million in funding for over 4000 children.<sup>123</sup> In FY 2002-2003 HHS used the Nation's Head Start centers as a pilot location for its new "Dare To Be You" program which "targets the crucial transitional time when youth enter kindergarten and

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<sup>119</sup> See

<http://www.nnheadstart.org/content.asp?CustComKey=52853&CategoryKey=116144&pn=Page&DomName=nnheadstart.org>.

<sup>120</sup> Exhibit 35, Navajo Nation Head Start Organizational Chart.

<sup>121</sup> See Exhibit 28; see also

[www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf](http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf).

<sup>122</sup> See <http://www.nnheadstart.org/> for a fuller description of all of the activities and programs undertaken by the Navajo Nation Head Start Program.

<sup>123</sup> See <http://aspe.hhs.gov/SelfGovernance/inventory/ACF/600.htm>.

first grade.”<sup>124</sup> In FY 2004-2005 HHS assisted the Nation with a Technical Assistance Project aimed at upgrading the data collection and data dissemination related to Head Start activities by the Nation.<sup>125</sup>

By Resolution CJY-37-05, the Nation in 2005 adopted the “Navajo Sovereignty in Education Act,” the purpose of which was to “establish the Navajo Nation Department of Diné Education, and to confirm the commitment of the Navajo Nation to the education of the Navajo People.”<sup>126</sup> As part of that Act, the Nation adopted Section 51:

§ 51. Early Childhood Development Services (Head Start Program)

A. The Navajo Nation recognizes the need for development services to support the growth of young Navajo children within the family and the viability of the family within the community. The Department of Diné Education shall assure participation of the Navajo Nation in the National Head Start program to meet the needs of children from birth to five (5) years old.

B. The Head Start program shall establish a positive and supportive learning environment for children, parents, and staff, which offer family members opportunities and support for growth and change.

C. The Head Start program shall focus on the child and family in addressing early childhood developmental needs; including medical, dental, mental health, nutrition, and parental involvement. In addition, early childhood services should be appropriate and responsive to each child and the family’s cultural and language background.

D. The Head Start programs shall foster the role of parents as the primary educators and nurturers of their children. Parents should be encouraged to become involved in all aspects of their child’s development from participation in the Center’s child-based activities to direct involvement in policy and program.

E. Each Head Start Center is encouraged to establish partnerships with community resources in the effort to maximize the benefits to the children served.

F. Each Head Start Center shall employ qualified staff who have the knowledge, skills, competence and sensitivity necessary to provide quality and comprehensive services to young children.

A second statute also provides the legal basis for the Nation Head Start program, and firmly defines Head Start as providing educational services. Title 10 to the Navajo Nation Code sets forth the education responsibilities of the Nation. Chapter 20 is entitled, “Diné Language Head Start Act.”<sup>127</sup> Section 2201 states, in part:

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<sup>124</sup> See [http://www.cdc.gov/od/science/PHResearch/grants/fy2002\\_003abstract.html](http://www.cdc.gov/od/science/PHResearch/grants/fy2002_003abstract.html).

<sup>125</sup> See [http://www.acf.hhs.gov/programs/ccb/ccdf/rte/rte2004/part7\\_childcare\\_CCTAN.htm](http://www.acf.hhs.gov/programs/ccb/ccdf/rte/rte2004/part7_childcare_CCTAN.htm).

<sup>126</sup> Exhibit 36, Navajo Sovereignty in Education Act of 2005.

<sup>127</sup> 10 N.N.C. §§ 2201-2206. See Exhibit 37, Diné Language Head Start Act.



The Navajo (Diné) people recognize the importance of continuing and perpetuating the Navajo (Diné) language to the survival of the Navajo Nation. Instruction in the Navajo (Diné) language shall include to the greatest extent practicable, thinking, speaking, comprehending, reading, writing and the study of the formal grammar of the Navajo (Diné) language.<sup>128</sup>

Section 2202 states, in part:

The purpose of having the Navajo (Diné) language as an instrument of instruction within the Navajo Head Start program is to enable children to communicate freely and effectively through the Navajo (Diné) language, not as a second or foreign language but the language of the Navajo (Diné) people. The Navajo Nation is committed to ensure that the Navajo (Diné) language will survive and prosper. The Navajo (Diné) language must be used to ensure the survival of the Navajo (Diné) people and their future, to maintain the Navajo way of life, and to preserve and perpetuate the Navajo Nation as a sovereign nation.

**Issue 6: Use of the Schools and Libraries Program Funded Service by Ineligible Users (p. 12)**

**Question 6.1:** At our September 12, 2008 meeting, you stated that there is ample evidence that community members gain access to the SLSM funded wireless signal after hours. You further stated that you found evidence that public safety personnel used the SLSM funded access to conduct Navajo Nation government business. Please provide a full and complete explanation of the extent to which SLSM funded equipment and services have been/are being used by ineligible users. To the extent any function or activities are not eligible, provide the cost allocation between the portion of costs that are eligible and the portion that are ineligible for all funding years.

**Response:** See *supra* response to Issue 4.2.

**Issue 7: Master Agreement with OnSat was Not Competitively Bid (pp. 12-13)**

**Question 7.1:** At our September 12, 2008 meeting, you stated that the master agreement between the Navajo Nation and OnSat, upon which all the funding requests associated with OnSat have relied, was not competitively bid. Please provide a full and complete explanation of your statement as well any documentation necessary to support your explanation.

**Response:** The Master Agreement, that governs the relationship between OnSat and the Nation, was entered into in 2001, two years before the Nation received E-rate funding. It was the result of a “partnership” between OnSat and the Bill and Melinda Gates Foundation, that funded installation of computers and satellite uplink facilities at the Chapter Houses. Because of the unique nature of the arrangement, in which the Gates Foundation funded the entire Master Agreement, the 2001 Master Agreement was not competitively bid. This

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<sup>128</sup> 10 N.N.C. § 2201.

established OnSat as the incumbent carrier for the Nation. According to the response to USAC of Ernest Franklin on November 2, 2006, in most subsequent years there were no other bids in response to the Nation's Form 470. "I received several phone calls inquiring about the service but when I explain [sic] our situation they decline to respond. I have attached the quotes from the incumbent internet carrier for your review."

Mr. Franklin also responded that: "FY 2006 was the first time we received a second bid for satellite service. We weighted the criteria again according to our procurement rules and again Onsat was selected based on the criteria with price being the major factor."<sup>129</sup> He had previously stated:

"Under Navajo Nation procurement law, price is always considered as 50% of the selective criteria followed by 25% for overall experience in the field, and 25% for Navajo Preference. This is always been the case since before the agreement with On-Sat. On-Sat was selected based on these policies, which included the 50% price factor as part of the decision."<sup>130</sup>

We find nothing in Nation procurement law or regulation<sup>131</sup> to support Mr. Franklin's contention that the factors in evaluating a contract are 50% price, 25% experience, and 25% Navajo preference. Nation Procurement Rules and Regulation, Section III(G)(1), states:

"The goal of Bid Evaluation is to select a responsible vendor that is the most responsive and best serves the needs of the Navajo Nation which include adherence to the Navajo Nation Business Opportunity Act and providing the Procuring Party with a reasonable price that is equal to or below the Maximum feasible Cost for the Goods requested with such Goods delivered to the specified location by the specified delivery date. The lowest cost alone may not always best serve the needs of the Navajo Nation."

Moreover, even if that the criteria described by Mr. Franklin were correct, they are not the criteria Mr. Franklin used in at least one instance, where price was given 45% weight.

The bid selection criteria used by Mr. Franklin in 2006, however, technically comply with FCC regulations which require that price shall be "the primary factor" when considering competing bids. As the Commission has noted, applicants may take other factors into consideration, provided that in selecting the winning bid, price be given more weight than any other single factor. This formula affords applicants the requisite flexibility to select the most cost-effective services available to it. The Commission clarified the point, by way of example, that "if, in selecting bids, an applicant assigns 10 points for reputation, 10 points to past experience, and 10 points to timing considerations, it must assign at least 11 points to price."<sup>132</sup> The Nation was allowed to take into consideration and award a preference to a

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<sup>129</sup> Letter of Ernest Franklin to USAC of February 13, 2007.

<sup>130</sup> Letter of Ernest Franklin to USAC of January 4, 2007.

<sup>131</sup> 12 N.N.C., Chapter 3, Navajo Nation Procurement Act, §§ 301 *et seq.*; Navajo Nation Procurement Rules and Regulation, Section III.G, "Bid Evaluation."

<sup>132</sup> See Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, CC Docket 96-45, 18 FCC Rcd 26407, 26433, para. 50 (2003); *see also* Id. at note 138.

supplier willing to provide hiring preferences and training to tribal members. *See Western Wireless Corporation*, FCC 01-283, ¶ 15 (released October 5, 2001).

The “scoring grids” from the 2007-2008 RFP show that scoring was done in such a way that OnSat was essentially assured a win. Below is a chart that compares the bids received from OnSat and Southwest Communication System (the only other bidder who bid on providing internet access for all 111 Chapter Houses).

Item	Poss. Points	OnSat Bid	Southwest Bid
Month Recurring		\$188,145	\$31,500
Cost per site		\$1695	\$283.78
Price	45	23	35
Prior Experience	25	25	15
Navajo Experience	30	30	15
Total Points	100	78	65

OnSat’s bid was more than 5 times that of Southwest, yet OnSat received 23 out of 45 points (or 51% of the possible points in that category), while Southwest received only 35 out of 45 points (or 77% of the points in that category) for a bid more than 5 times less. Because of OnSat’s scores in both Navajo Experience and Prior Experience (a perfect 55 out of 55), even if Southwest had received a full 45 out of the 45 points offered for the price evaluation, Southwest *still* would not have been awarded the contract, since its score of 75 would still have been less than OnSat’s score of 78. In other words, Southwest could have offered its services for free, and would not have won.

Mr. Franklin and his team may also have been influenced in the 2006 decision by a memo from Nation President Joe Shirley.<sup>133</sup> President Shirley, who has no direct experience with E-rate matters, strongly urged Mr. Franklin to again choose OnSat based upon his view of the needs of the Nation.

- “I am aware that you are in the process of evaluating alternative services for the Navajo Nation Library Consortium and Dine’ Education for 2006-2007. This particularly includes the Chapter Houses and other important sites on the Nation.”
- “Please remember as part of your evaluations that the Navajo Nation Police Department and Division of Public Safety use wireless and satellite connection at the Chapters to connect to their very secure private network. The ongoing connections at these sites are extremely important to the safety and security of our officers and our people.”
- “The Nation’s partnership with OnSat in Tse Bonito to build a satellite hub and create such opportunities as jobs for our people and economic opportunities are tremendous. You have been at these meetings and know how great these opportunities are. I certainly want to know how any change

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<sup>133</sup> Exhibit 29, February 9, 2006 memo from President Shirley.

in a service provider under the above program would affect those opportunities.”

The memo clearly implies that OnSat should be retained because of an ongoing “partnership” that benefited the Nation by providing jobs and opportunities to the Navajo people. Again, as President of a sovereign nation, President Shirley was advocating what he thought best for his people, without, apparently fully understanding the complexities of E-rate regulations, and requirements and standards set for above. Mr. Franklin may, of course, have felt some pressure to choose OnSat again as the E-rate provider. As part of the Compliance Plan in Part III, every effort will be made to insulate the decision makers from any such implicit or explicit pressure to choose any particular service provider in the future.

**Question 7.2: Please provide the information listed below for each Funding Request Number (FRN) in all funding years that relies upon (1) the master agreement between the Navajo Nation and OnSat, and (2) the Funding Year 2008 contract with Hughes Network Systems, LLC (Hughes). In the event that a document (e.g., contract, RFP, bid response, etc.) applies to multiple FRNs, simply indicate on the first page of the document which FRN(s) is supported by the document. If for any reason you do not have any of the documentation requested below, provide a complete explanation for why it is missing.**

**a. Signed and dated copies of any and all agreements related to each of the FRNs including any and all contracts, agreements, Statements of Work, etc.**

**Response:** See Exhibit 1 for a complete list and copies of all contracts, addenda, modifications, and statements of work between the Nation and OnSat.

**Question: 7.3. Copies of any and all requests for proposals (RFPs), invitations to bid, requests for bids, or other documentation of bid requests for services and/or products requested, or other solicitations in any way associated with these FRNs. Be sure to include any and all amendments made to the original RFP. All RFPs should indicate when they were first made available to service providers, i.e., release and posting date as well as the due date for which bids must be submitted.**

**Response:** In previous responses, Ernest Franklin has provided materials related to this issue to USAC. We have reviewed the files of Mr. Franklin, and Exhibit 39 contains all additional documents that relate to RFPs and the Nation’s scoring methodology. We do not have access to any other information to respond further.

**Question: 7.4. Indicate the number of bids/proposals received for all FRNs and provide complete copies of any and all proposals, bid responses, etc., received in response to the FCC Forms 470, and/or any RFP, or other solicitation in any way associated with the FRNs and/or with the selection of these two vendors.**

**Response:** See above.

**Question: 7.5. Provide all documentation created during the bidding process that indicated how and why the Navajo Nation selected these two vendors. Include all bids that the Navajo Nation received and any other bid documentation such as attendance sheets, correspondence to and from the bidding vendor and a description of the Navajo Nation's bid evaluation process.**

**Response:** See above.

**Question: 7.6. Please indicate if a consultant was used for the planning, implementation, and support of the Navajo Nation's SLSM funding request(s) and provide a signed and dated copy of any consulting agreement (s) or Letters of Agency. If a consultant was not used, please indicate as such. If either vendor provided these types of services to the Navajo Nation, please provide a full and complete description of the services provided.**

**Response:** The Nation did not engage an outside consultant to assist in the planning, implementation, and support of the Nation's funding requests. The Nation initially relied on the expertise of its incumbent telecommunications provider, OnSat, in preparing those documents.<sup>134</sup> There were indications in the Special Review, and during the interview process for this investigation, that OnSat exercised undue influence on the planning, implementation and support of the Nation's E-rate participation. See Part III for an explanation of the Nation's plans moving forward in terms of the hiring of an outside consultant to assist it with the E-rate program, and prohibiting service providers from influencing the procurement process.

**Question: 7.7. Provide a copy of all correspondence between the Navajo Nation and these two vendors or consultants regarding the competitive bidding process and the application process.**

**Response:** We do not have any hard copies of any correspondence between the Nation and the vendors concerning the competitive bidding process. The Nation's Attorney General's Office is in custody of Mr. Franklin's laptop and we are coordinating with the Nation's special prosecutor to determine how to gain access to any information contained on this laptop that may be relevant to responding to this question. We will supplement this response if we come into possession of any relevant correspondence in electronic form.

**Question 7.8. Provide a copy of the Navajo Nation's organizational flow charts applicable for each funding year clearly identifying the business functionality and reporting structure in the organization.**

**Response:** We have no additional information beyond what is provided in Exhibit 39 and in prior responses of the Nation.

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<sup>134</sup> See Exhibit 30 (E-mail from July 2002 with OnSat giving guidance on how to set up the Chapter Houses as libraries under E-rate rules).

**Issue 8: Modification 6 to the Master Agreement (pp. 13-14)**

**Question 8.1:** At the September 12, 2008 meeting, you stated that signature page for modification 6 to the master agreement between the Navajo Nation and OnSat was a photocopy of modification 5 but with a date change. Please explain whether this rendered modification 6 invalid under applicable law and the basis upon which it did so.

**Response:** *See, supra*, Part I, A.6 for a full discussion of this issue.

**Issue 9: Funding Year 2008 Contract Issue (p. 14)**

**Question 9.1:** The Navajo Nation informed USAC that at the time it submitted Funding Year 2008 FCC Form 471 # 635302, it had not entered into an agreement with Hughes, the service provider named on the FCC Form 471. Consistent with program rules and USAC procedures, USAC informed the Navajo Nation that USAC intended to deny this funding request. The Navajo Nation has requested extensions of time to respond to USAC's notice, the last of which expired May 2, 2008. According to correspondence between the Navajo Nation and Hughes provided to USAC, the Navajo Nation determined that it could not sign the contract with Hughes because it was unable to terminate its existing contract with OnSat.

**Please explain the Navajo Nation's plan for their Funding Year 2008 requests. Please explain why the Navajo Nation solicited bids for Funding Year 2008, appeared to have entered into an agreement with Hughes, and then determined that it could not terminate its existing agreement with OnSat.**

**Response:** With respect to FCC Form 471 # 635302, to date, the Nation has not been informed by USAC that it intends to deny this request. The Nation has received inquiry regarding the status of the Hughes agreement from USAC's PIA staff and provided responses thereto. At the time the Form 471 # 635302 was filed, the Nation had not yet countersigned the contract that it had negotiated with Hughes. The contract had been signed only by Hughes.

In light of the Special Review, the Nation determined that it should re-bid its satellite connectivity contract. The goal was to determine that the vendor selected to provide connectivity to the Nation's Chapter Houses was in fact the most cost-effective vendor. When the Nation received the responsive bids, the Nation's new E-rate Official, Ms. Pearl Lee, deemed that Hughes should be awarded the service contract. The Nation worked tirelessly with Hughes to resolve all of the pending contractual issues so that an agreement could be finalized. This process, however, was hindered because of the Nation's remaining obligations to OnSat and therefore, although the contract negotiations were completed before the FCC 471 due date, the draft agreement was not signed by President Shirley as his counsel

believed that the Nation remained contractually bound to OnSat. For this reason the Nation decided to seek to amend the Form 471 and request that OnSat be named as the contractor for that funding year. Because the Nation has asked USAC and the FCC to stay all pending actions with respect to all pending funding requests, the Nation has not received any communication from USAC that it intends to deny any pending funding request.

The Nation plans to terminate the service agreement with OnSat. With respect to the Nation's FY 2008 requests, the Nation seeks waiver of USAC's filing deadlines so that it may re-bid the contract for Chapter House connectivity. The Nation will then work with USAC to fund the competitively selected new vendor or vendors.

**Issue 10: Funding Year 2008 Services Issue (p. 14)**

**Question 10.1: The Navajo Nation's Funding Year 2008 FCC Form 471 # 633508, requests \$559,563.20 for telecommunications services. Please explain whether these services have a different functionality from the Internet access services for which funding has been sought on FCC Form 471 # 635302. Because the services requested on the two FCC Forms 471 are broadband services, pursuant to SLSM rules and USAC's normal operating procedures, USAC needs to determine whether they are duplicative services.**

**Response:** The services requested in FCC Form 471 #633508 are for the provisioning of T-1 internet connectivity to the 34 listed chapters. These internet access services are the functional equivalent of the services that were sought from OnSat in FCC Form 471 #635302. However, as documented above, because of the nature of the OnSat contract as interpreted by OnSat, the Nation was obligated to pay the full amount of the contract, regardless of how many Chapter Houses actually received service.<sup>135</sup> OnSat remained a vendor to the Nation because there were, nevertheless, Chapter Houses that could not be reached via T-1 or any other landline based connectivity. Although the OnSat services would have been duplicative at those 34 sites, the service remained necessary for the more remote Chapter Houses. The AT&T service was to be provisioned at these 34 sites as this service is a much more robust, stable and efficient means of delivering internet connectivity to the sites where their service was available.

USAC correctly notes that the amount requested totals \$559,563.20 as noted in line 25b of the form. However, this amount incorrectly includes a request for \$118,597.05 listed in line 23g as an ineligible non-recurring amount. Therefore, the correct amount requested should be \$452,825.86, as noted in line 23k. The Nation takes notice of this error and will work to determine the source of the error and to mark up and return to USAC the Receipt Acknowledgement Letter ("RAL") with the appropriate changes reflected in a timely fashion upon receipt of the RAL.

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<sup>135</sup> See Exhibit 6, (Stephens memo of June 27, 2006, stating "The total cost for the bandwidth is divided by the number of Chapters whether 70 Chapters or 110 Chapters").

### **Part III. Moving Forward:**

#### **A. Immediate First Steps**

Ernest Franklin has been placed on investigatory leave by the Nation, relieved of all duties going forward related to E-rate participation, and will be barred from further participation in the E-rate program. The Tribal Council has appointed a Special Prosecutor to investigate whether any Nation laws have been violated.

The Nation will seek to cease all contractual relations with OnSat as soon as practicable.

#### **B. E-Rate Compliance Plan**

An E-rate Compliance Program has been prepared and recommended for adoption to the Nation by GSB in connection with and in response to information discovered during the Nation's internal OnSat contract investigation as detailed below.<sup>136</sup> This compliance process is structured on two progressive levels:

1. The training of existing officials within the Nation to help govern, review and ensure the compliance of the process; and
2. The establishment of an application and e-rate review process.

The first part of the E-rate compliance plan is the education of all relevant individuals on the regulatory framework that governs the E-rate program. To that end, the Nation seeks assistance from USAC to schedule a Helping Applicants to Succeed ("HATS") session as part of this program. The HATS initiative will be used to better train the individuals responsible for the Nation's participation in and compliance with the E-rate program's requirements. The HATS training seminar will be attended by members of the Nation from the Office of the Attorney General, the Office of the Auditor General, the Office of the Controller and the Nation's Telecommunications Regulatory Commission.

The Nation will also retain an outside E-rate consultant (the "Consultant") to assist the Nation with technology funding issues, to oversee correspondence with USAC, to monitor the deployment and delivery of E-rate funded services and to review all relevant documentation to ensure that E-rate rules are strictly adhered to.

#### **C. Application Process**

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<sup>136</sup> Some of this Compliance Plan can be implemented by the Nation without further legislation. Other matters contained within this Compliance Plan will require the passage of additional resolutions or legislation by the Navajo Tribal Council.



In order to ensure transparency and program compliance, all service provider contracts will be subject to multiple layers of review. First, the Nation will review and amend its Technology Plan with oversight from the outside Consultant to update the technology needs of the Nation and to ensure the most cost effective means of deploying the technologies to the Nation's members. Current vendors will participate in this process only to provide specific input at the request of the preparers of the Nation's Technology Plan. Once the Nation has determined what technology will be procured in any given year, the Nation will prepare a formal Request for Proposals to be posted along with the Nation's FCC Form 470. All bids will be submitted directly to the Office of Technology Procurement in sealed packages and will only be opened in the presence of representatives from the Nation's Attorney General's Office, Auditor General's Office and Office of the Controller.

The Nation will not, under any circumstances, permit a vendor to deliver E-rate and non-E-rate goods and services under a single contract and no single master agreement will be awarded for service procurements. The provision of any telecommunications services to other departments of the Nation will not be considered in evaluating a contract for E-rate supported services. Multi-year agreements will be entered into only when the multi-year agreement is economically practical. Contracts for each service requested will be awarded based on a number of factors, price being the most important. Each proposal will be awarded based on the aggregate number of points awarded by the Nation's team of contract reviewers, but always in a manner in which price considerations are of paramount concern.

The Nation will also ensure that each E-rate funded technology contract will have a start date and a termination date that is tied to the SLD's annual E-rate funding calendar, notwithstanding the fiscal calendar (October 1 – September 30) used by the Nation.

Once the Nation's vendors have been selected for each funding year, the Nation's E-rate compliance officer will prepare each FCC Form 471 for review and approval by the Nation's Attorney General and Auditor General. This approval will occur before the final form is submitted to the SLD for funding.

All payment processes for E-rate contracts will be centralized in the Nation's Accounting Department, and will be only entrusted to individuals with E-rate training. The Nation will develop a web-based contract tracking portal, so that E-rate contract status monitoring can be available to individuals from the associated Nation offices.

During the application process, the Nation's E-rate official will work with the Nation's accounting office to ensure that in each funding year, a separate budget line item specifically allocates funds for the Nation's non-discounted obligations. This annual allocation will contain a set-aside amount equal to the Nation's required payments under all contracts for which the Nation will seek funding.

#### **D. Invoicing Process**

The Nation will ensure each E-rate funded contract contains terms that require invoices submitted to SLD to be reviewed and approved by the Nation prior to their

submission. Any service provider that fails to comply with these terms will be subject to penalties and/or default. The process will require that any service provider invoice be sent first to the Nation's contract review staff. If the Nation's review staff approves the invoice, based on confirmation of delivery of the invoiced goods or services, the Nation review staff will approve that invoice and permit the service provider to submit the invoice to the SLD for reimbursement. The Nation will also use the USAC Open Data Search Tool to review the invoice amounts submitted to USAC and to ensure that appropriate invoices were submitted.

One major problem identified during the course of this investigation was the degree of control permitted the service provider when invoicing USAC. OnSat was able to invoice USAC based on the *entire amount approved by USAC* and not based on the value of the services actually delivered to the Nation. It is for this reason that the Nation's payments to OnSat do not reflect the full amounts that should have been paid to OnSat under the E-rate rules. By requiring the service provider to submit all invoices to the Nation, and to receive the Nation's approval before submission for reimbursement, the Nation can ensure that it has made its required payments.

#### **E. Annual Audit Process**

In addition to the Nation's Office of the Auditor General, which employs the Nation's staff auditors, the Nation maintains a contract with KPMG to serve as outside auditor for the Nation's budget. Annually, at the conclusion of each funding year, the Nation will commission a team of auditors from KPMG to review all contracts that received E-rate funding for the preceding year. The audit will review what goods and services were received by the Nation in that given year, the amount of E-rate funds used to pay for those goods or services, the requisite payments made by the Nation, and all related accounting and tracking documentation.

To ensure that the payments come directly from the separate E-rate account in the Nation's budget, the audit process will review the source used for each payment made to a service provider. To ensure that the Nation does not receive any funds directly or indirectly from any service provider, the Nation will not enter any contracts that call for the payment of funds from an E-rate service provider to the Nation.

A copy of each annual E-rate report will be delivered to the Office of the Attorney General at the conclusion of each review period and will be made available to USAC's Program Integrity Assurance review staff. If any funds requested and approved are not used, the Nation will file an FCC Form 500 to modify the approved amount and to ensure that the unexpended amount is returned to the SLD for other beneficiaries.

#### **F. Responses to the Nation's Audit Report Recommendations**

The recommendations set forth in the Audit Report generally do not address goods or services acquired using E-rate funds, and thus are outside the scope of GSB's investigation and of USAC's jurisdiction. However, the remediation plan outlined above certainly addresses the concerns set forth in the Audit Report and will ensure that USAC is not billed

for goods or services not received by the Nation. The recommendations and responses are set forth, *ad seriatim*, below.

1. The Audit Report recommends that the Nation's Office of the Controller should establish and implement controls to ensure an effective review and approval process to validate vendor invoices before payments are processed. With the inclusion of the above steps, specifically that any invoices submitted to USAC for payment directly to any vendor will be first reviewed for accuracy by the Nation, USAC will be assured that only services actually provided at each site will be paid for using USAC funds. Compliance with this process will be monitored by the Nation's Attorney General's Office, Auditor General's Office and will be reviewed annually by KPMG during the Nation's annual E-rate audit.

2. The Audit Report further recommends that the Office of the Controller pursue the recovery of improper and questionable payments identified in the Audit Report. The Nation, through outside counsel, has identified the payments the Nation has made to OnSat. The Nation will work with USAC to determine if any of these payments were improper. The Nation is currently reviewing whether improper payments were made directly from the Nation to OnSat and will proceed accordingly.

3. Finally, the Audit Report recommends that DCD and Head Start document bandwidth utilization for each Chapter and Head Start site provided by OnSat to enable them to identify outages or transmission interruptions that would warrant an out-of-service credit. Due to the nature of services delivered by OnSat and the terms and conditions of their Master Agreement, it was impossible to achieve this level of reporting from OnSat. However, in all future contracts, bandwidth will be provisioned on a site-by-site basis and not on a complete system basis. Such contracts will require the provider to submit reports related to bandwidth use at each site, and will permit each site to contact any service provider directly in cases of service outages. The Nation's Office of the Controller's Fixed Asset Section will ensure that each asset acquired by the Nation that meets the Nation's capitalization threshold of \$5,000 will be properly inventoried in a separate E-rate asset tracking database. The Nation will ensure, through multiple layers of review, that only goods and services that are provided to the Nation are actually paid for, whether by the Nation directly, or by USAC.

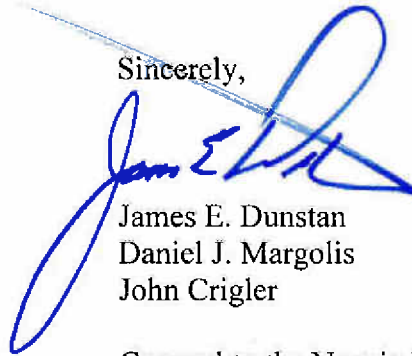
## **Conclusion**

We have attempted to provide USAC with as much information as possible in responding to the various inquiries concerning the Nation's participation in the E-rate program. We have detailed a number of issues related to the Nation/OnSat relationship and questionable contracting and invoicing practices. But what remains clear is that the Nation remains on the other side of the "digital divide," and the E-rate program was specifically designed to help bridge that gap with Federal funding. President Shirley, in his prior responses, highlighted this key issue, which has the support of members of Congress. The FCC in the past has been very supportive of the Nation's efforts to provide 21<sup>st</sup> Century telecommunications in a sparsely populated area with significant geographic challenges that hinder the deployment of traditional landline telecommunications networks. When OnSat, with the support of the Gates Foundation first embarked on building a satellite-based network

to deliver broadband to remote portions of the Nation, it was universally heralded as a good idea. While the implementation may have had its flaws, the needs of the Navajo people remain the same, including the dire need for financial assistance from the Federal government.

The Nation is committed to moving forward to rectify past problems with its participation in the E-rate program and to work with the FCC and USAC to ensure compliance with E-rate procedures. We look forward to USAC's response to our submission today, and stand ready to answer whatever remaining questions you may have. Please bear in mind that while the Nation remains unfunded under E-rate, the Navajo people are being denied their only real connection to the rest of the digital world. We hope that this matter can be brought to a swift resolution and a pathway found for the Nation's continued participation in the E-rate program.

Sincerely,



James E. Dunstan  
Daniel J. Margolis  
John Crigler

Counsel to the Navajo Nation